QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period:

From July 1, 1939

Through September 30, 1939

Volume XVI

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with an Act No. 50 House Bill 225 approved February 21, 1939, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This report covers all opinions rendered by the Attorney General from July 1, 1939 through September 30, 1939.

The Act referred to above requires that seven copies of this Quarterly report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Act also provides a copy of said report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestion to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

THOMAS S. LAWSON,

Attorney General.

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OPINIONS

July 1, 1939.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Beverage Control Act—

1. State Liquor Stores may not remain open on July 11, 1939, which is the day fixed by law for the holding of an election by the qualified electors of the State upon proposed amendments to the Constitution.

2. Licensees under the Alabama Beverage Control Act, both wholesale and retail, of any kind of alcoholic beverages, may not sell, furnish or give any such beverages to any person on July 11, 1939, which is the day fixed by law for the holding of an election by the qualified electors of the State upon proposed amendments to the Constitution, until after the time fixed by law for the closing of polling places.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of June 7, 1939, in which you request my opinion as follows:

"Subsection (b) of Section 8 of the Alabama Beverage Control Act reads in part as follows:

" 'Provided, further, there shall be no State Liquor Stores operated on any Sunday, primary election day, general election day or municipal election day under any circumstances.'

"Subsection (3) of Section 24 reads as follows:

" 'For any licensee to sell, furnish or give any liquor, vinous and/or malt or brewed beverages to any person until the hour after the time fixed by law for the closing of polling places on days on which a general, municipal, special or primary election is being held.'

"We request your opinion on the following questions arising from the above mentioned sections:

"1. Must the State Liquor Stores remain closed on July 11, the day set for a special election for constitutional amendments?

"2. In the event you answer in the affirmative Question 1, then is it permissible to open the said stores after the hour fixed by law for the closing of polling places?

"3. Must all retail licensees licensed by this Board discontinue the sale of alcoholic beverages on July 11? If so, would it be permissible for them to reopen after the hour fixed by law for the closing of polling places?

"We will appreciate very much your advising us on the above as soon as possible in order that we may make the necessary arrangements to notify Stores, etc., regarding this election."

On July 11, 1939, an election by the qualified electors of the State of Alabama upon certain proposed amendments to the Constitution will be held, the day being the day set for such election by the Legislature in its recent special session at which the said proposed amendments to the Constitution were submitted.

The provisions of the Alabama Beverage Control Act pertinent to your inquiry are contained in Subsection (b) of Section 8 of said Act, which is the section dealing with liquor stores, and reads in pertinent part:

"Provided, further, there shall be no State Liquor Stores operated on any Sunday, primary election day, general election day or municipal election day under any circumstances";

and in Section 24, Subsection (3) thereof, which provides:

"Unlawful Acts:—It shall be unlawful: * * * (3) for any licensee to sell, furnish or give any liquor, vinous and/or malted or brewed beverages to any person until the hour after the time fixed by law for the closing of polling places on days on which a general, municipal, special or primary election is being held."

Even though the election to be held on July 11, 1939 is not a "general election" in the ordinary and accepted meaning of this term, I am of the opinion, that the Legislative intent when the act under consideration was passed, was that the term "general election" should apply to elections that were 'general" throughout the sixty-seven counties of the State. The intent of the lawmakers is the law. **Williams vs. State,** 235 Ala. 520, 179 So. 915; **Cert. Denied** 179 So. 920. Therefore, I am of the opinion that since the election to be held on July 11, 1939 will be held in all of the sixty-seven counties of the State, the prohibition contained in subsection (b) of Section 8 of the Alabama Beverage Control Act, supra, against State Liquor Stores being operated on election days applies to the election to be held on July 11, 1939. It, therefore, follows that all Liquor Stores may not remain open on that day.

This obviates the necessity of answering your second question.

My answer to your third question is in the affirmative. Subsection (3) of Section 24 of the Alabama Alcoholic Beverage Control Act, supra, specifically provides that all licensees under the Alabama Beverage Control Act (this includes all licensees, whether wholesale or retail, of any kind of alcoholic beverages, that is, liquors or malts or brewed beverages) may not lawfully sell, furnish or give away any kind of alcoholic beverages to any person until after the hour fixed by law for the closing of polling places. The prohibition contained in this subsection applies to elections of every type and nature. It is, therefore, my opinion that such licensees may not sell, furnish or give away any kind of alcoholic beverages or liquors on July 11, 1939, the day

fixed by law for the holding of an election by the qualified voters on the proposed constitutional amendments, until after the time fixed by law for the closing of polling places.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 1, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Department of Finance—Section 32-A of Act No. 72, approved March 7, 1939 does not repeal Act No. 87, H. B. 6, approved March 23, 1933 (Acts 1933, p. 81) in so far as any limitations on the per diem expenses of the Director of Finance, the Division Chiefs or Heads, and the other employees of the Department of Finance are concerned, other than assistant Examiners of Accounts. But on the contrary, the Director of Finance, the Division Chiefs and Heads and other employees of the Department of Finance, other than the Assistant Examiners of Accounts, are subject to the provisions of Act No. 87, H. B. 6, approved March 23, 1933 (Acts 1933, p. 81) when traveling in the service of the State.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated May 11, 1939, which is as follows:

"Re: Department of Finance Act of 1939—House Bill No. 72 by Mr. Dominick.

"Under date of March 19, 1939, I submitted a request to you regarding an interpretation of Section 32-A of the above Act. I wish at this time to withdraw entirely said request and the question contained therein, and to re-submit the proposition as a new request, asking of you an answer to the following:

"1. Would not the wording of Section 32-A of House Bill No. 72 have the effect of repealing the provisions of House Bill 87, page 81, General Acts of 1933—Special Session in so far as any limitations on the actual per diem expenses of the Director of Finance, the Division Chiefs or Heads, and the employees of the Finance Department are concerned, other than the Assistant Examiners of Accounts?"

In answering this question, attention is first directed to Act No. 87, H. B. 6, approved March 23, 1933 (Acts 1933, p. 81), which is as follows:

"Section 1. The maximum amount allowable to persons traveling in the service of the State of Alabama or any of its agencies or institutions for expenses other than actual expense of transportation shall be $3.00 per diem."

The above Act, supra, controls the expense allowance of persons traveling in the service of the State, or any of its agencies unless there are Acts relating to certain State agencies which effect a repeal of same in so far as those agencies are concerned. This then brings us to the question propounded by you, that is, does Section 32-A of House Bill No. 72, approved March 7, 1939 repeal the above quoted Act, supra, in so far as any limitations on the per diem expenses of the Director of Finance, the Division Chiefs or Heads, and the employees of the Department of Finance are concerned, other than Assistant Examiners of Accounts. We think not. Section 32-A, supra, is as follows:

"Section 32-A. There is hereby appropriated out of the State Treasury such monies as may be necessary to carry out the provisions of this Act, and to pay the salaries provided for and expenses incurred hereunder."

It will be noted that the above section, supra, is a general appropriation of monies from the State Treasury for the purpose of carrying into effect the provisions of Act No. 72 approved March 7, 1939, which Act created the Department of Finance of the State. Said section, supra, makes provision for the payment of the salaries provided for in said act and also the expenses incurred thereunder. There is, however, no express provision in Section 32-A, supra, for the payment of the actual per diem expenses incurred by the Director of Finance, the Division Chiefs or Heads, or the other employes of the Department of Finance. Furthermore, a careful examination of the Act as a whole fails to disclose any such provision. Therefore, although section 33 of the Act creating the Department of Finance provides for the repealing of all laws or parts of laws in conflict with the provisions of said Act, it cannot be said that section 32-A, supra, or any other provision of said Act, expressly conflicts with or repeals the provisions of Act No. 87, H. B. 6, supra, as no reference or express provision is made for the payment of the actual per dim expenses of the Director of Finance, the Division Chiefs or Heads, or other employees of the Department of Finance when traveling in the service of the State. On the question of repeal by implication our Supreme court has often spoken. In the case of **Davis, et als. vs. Brosder,** 231 Ala. 332, 165 So. 891, Mr. Justice Knight, in speaking to this point said:

"(2, 3) We are not unmindful of the fact that repeal by implication is not favored in the law. It is only when two laws are so repugnant to or in conflict with each other that it must be presumed that the Legislature intended that the latter should repeal the former. If there is a reasonable field of operation, by a just construction, for both, they will both be given effect. This is said to be preferable to repeal by implication. City of Birmingham v. Southern Express Co., 164 Ala. 529, 51 So. 159; Riggs v. Brewer, 64 Ala. 282; Herr v. Seymour, 76 Ala. 270; Wyman v. Campbell, 6 Port. 219, 31 Am. Dec. 677; State ex rel. Grace v. Smiley, Clerk, 219 Ala. 119, 121 So. 398; State ex rel. Tubbs et al. v. White, 160 Ala. 168, 49 So. 78."

Also in the case of **Alford v. Claborne,** 229 Ala. 401, 157 So. 226, Mr. Justice Gardner in delivering the opinion of the Court said:

"It is of course well understood that repeal by implication is not favored, and that nothing short of an irreconcilable conflict between two statutes works such result. State v. White, 160 Ala. 168, 49 So. 78; City of Birmingham v. Southern Express Co., 164 Ala. 529, 51 So. 159. Or, as otherwise expressed both statutes will be permitted to stand if it can be done upon any reasonable construction. Ferguson v. Commissioners' Court of Jackson County, 187 Ala. 645, 65 So. 1028; City of Mobile v. Mobile Electric Co., 203 Ala. 574, 84 So. 816 Ex parte Jones, 212 Ala. 259, 102 So. 234."

Applying the principles of law, supra, it is our judgment that the two acts here in question are not repugnant or in irreconcilable conflict with one another thereby causing the repeal by implication of Act No. 87, H. B. 6, supra, by section 32-A of Act No. 72, approved March 7, 1939, or by any other provision thereof. But on the contrary, it is our judgment that there is a field of operation for both, in that Act No. 87, H. B. 6, supra, provides for the per diem expense allowance of persons traveling in the service of the State and Section 32-A, supra, of Act No. 72, approved March 7, 1939, provides for the payment of the lawful expenses incurred in carrying out the provisions of the Act.

In other words, that part of Section 32-A, supra, wherein provision is made for the appropriation of monies from the State Treasury to pay the expenses incurred in carrying out the provisions of said Act actually means, so far as per diem expenses of the officials and employees of the Department of Finance are concerned, that the actual per diem expenses as provided by law for persons traveling in the service of the State would be paid and not actual expenses.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 6, 1939.

Hon. W. G. Culp,
Sheriff, Chilton County,
Clanton, Alabama.

Sheriff's Fee in Condemnation Proceedings—

The sheriff is entitled to $1.50 for serving notice or summons on property owners in condemnation proceedings.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 24, 1939, in which you request my opinion as follows:

"Chilton County filed application in the Probate Court of Chilton County condemning certain rights of way for public road, and I, as Sheriff, am serving notice to the several property owners of the filing of the application and of the day appointed for the hearing under Section 7479 of the Code of 1923.

"Will you please advise me what fee I am entitled to for serving these notices, whether $1.50 or 65c under Section 7287 of the Code and I also refer you to Opinions of Attorney General 1930-1932, page 291."

Section 7479 of the Code of Alabama, 1923, to which you refer in your letter, is in words and figures as follows:

"Section 7479. Order of court on filing application; notice.—On the filing of the application the court must make and enter an order appointing a day for the hearing thereof; **and must issue to all the owners of such lands and to such other parties as claim or hold any right, title or interest therein, as reside in the state, notice of the application and of the day for the hearing thereof, which must be served by the sheriff or other legal officer at least ten days before the day appointed for the hearing**; if any of the owners or other parties be unknown, or if they reside out of the state, notice to them must be given by advertisement in some newspaper published in the county, or, if there be no newspaper published in the county, by posting notice at the courthouse door and three other public places, for at least three weeks before the day appointed for the hearing. If any of the owners or other parties be infants or persons of unsound mind, notice must be served on their guardian, if they have any resident in the state, but if they reside in the state and have no such guardian, then upon the persons who have them them in charge, or with whom they reside. If any of the owners or other parties be dead, and the lands are in the possession or under the control of the personal representatives of such deceased owners or other parties, notice must be served on such representatives and on the heirs at law of the decedents." (Emphasis supplied)

Section 7255 of the Code of Alabama, 1923, provides that:

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

Section 7479, supra, being silent as to any compensation for the Sheriff for serving the notice provided for therein, it is necessary that such compensation be provided for by some other statute if you are entitled to any compensation for serving said notice.

Section 7287 of the Code of Alabama, 1923, which is the section dealing with the fees of sheriffs, provides in part as follows:

"Serving summons and other mesne process, and returning the same ..... $1.50."

If the notice required by Section 7479 is or can be construed to be either a "summons" or "other mesne process," then you are entitled to a fee of $1.50 for serving such process.

In the case of **Birmingham Dry Goods Company vs. Bledsoe,** 21 So. 403, 113 Ala. 418, Mr. Justice McClellan, in writing the opinion of the Court, said as follows:

> "The word 'mesne' signified 'middle', 'intervening,' 'intermediate.' Process is the mandate of a court to its officer commanding him to perform certain services within his official cognizance. 'Mesne process,' strictly speaking, embraces all writs and orders of the court necessary for the carrying on of the suit, after it has been instituted, from and after the summons, which is original process, up to, but not including, those writs which are necessary to secure the benefits of the suit to the successful party, which are 'final process.' But in the sense in which the phrase "mesne process' has come to be used, and is used in section 3106 of the Code, it embraces all writs preceding execution, and describes any and all writs except final process."

I am of the opinion that the notices provided for in Section 7479, supra, come within the definition of the words "mesne process" as enunciated in the case above referred to. I am, therefore, of the opinion that for serving such notice you are entitled to receive the sum of $1.50.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 6, 1939.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Licenses—Schedule 127 of Section 348 of the 1935 Revenue Act—

1. Person operating skating rink is entitled to license for one-half year if he commences business after the first day of April.

2. Person operating skating rink must procure State and county license in every county in which same is operated or conducted.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 12, 1939, in which you request my opinion as follows:

> "Please advise if a half year license can be issued under Schedule 127, Revenue Laws of Alabama, also can the State license of Twenty-five Dollars ($25.00) be collected in more than one county.

"This schedule reads as follows:

"'Schedule 127. For each SKATING RINK an Annual State License of Twenty-five Dollars ($25.00) and a county license of Five Dollars ($5.00) for every county in which same is operated or conducted."

It is my opinion that your first inquiry should be answered in the affirmative, that is, a person operating a skating rink is entitled to a license for one-half year if he commences business after the first day of April. Section 368 of the 1935 Revenue Act provides:

"Unless otherwise provided, if any business licensed by this act shall commence after the first day of April in any year, the amount of the license or privilege tax shall be one-half of the year's license or privilege tax. In all other cases, the license shall be taken out for the full term of one year unless a shorter term is fixed by the provisions of this act."

Schedule 127 of Section 348 of the 1935 Revenue Act, which is quoted in your letter of inquiry, contains no provision against the issuance of a half-year license for the operation of a skating rink and, consequently, it is my opinion that a person operating a skating rink is entitled to a half-year license, pursuant to the provisions of Section 368, supra, if he commences business after April 1st. Cf. opinion to Hon. A. L. Hasty, Judge of Probate, Marengo County, Linden, Alabama, under date of February 19, 1937, Quarterly Report of Attorney General, Vol. VI, page 78.

In answer to your second inquiry, it is my opinion that a person operating a skating rink must pay the State license levied by said Schedule 127 of Section 348 of the 1935 Revenue Act in every county in which he operates the same. This is in accordance with the holdings of this office in opinions to Hon. Wm. Varner, Judge of Probate, Macon County, Tuskegee, Alabama, under date of June 24, 1938, Quarterly Report of Attorney General, Vol. 11, p. 115, Biennial Report of Attorney General, 1936-38, p. 660; and to Hon. A. L. Hasty, Judge of Probate, Marengo County, Linden, Alabama, under date of July 5, 1938, Quarterly Report of Attorney General, Vol. 12, p. 27, Biennial Report of Attorney General, 1936-38, p. 700, holding that a person operating a rolling store must procure both State and county license in every county in which he offers to do business. The language of the schedule levying the license on persons operating rolling stores, which is Subsection (b) of Schedule 104 of Section 348 of the 1935 Revenue Act, is strikingly similar, and identical in legal effect, to the language of Schedule 127, supra. Therefore, on the basis of the holdings of the above cited opinions of this office, it is my opinion that a person operating a skating rink must pay the State license levied by Schedule 127, supra, in each county in which the same is operated or conducted.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 10, 1939.

Hon. J. B. Kirby,
Sheriff, Hale County,
Greensboro, Alabama.

Alabama Beverage Control Act—

1. Alabama Alcoholic Beverage Control Board may legally transport alcoholic beverages from its warehouses in a wet county, through a dry county, to a State Liquor Store in another wet county, for sale from said State Liquor Store.

2. Wholesalers or distributors of malt or brewed beverages, duly licensed as such, may legally transport such beverages from their warehouses in a wet county, through a dry county, for delivery to a duly licensed retail dealer in such beverages in a wet county, for sale by such retail dealer in accordance with the provisions of the Alabama Beverage Control Act.

Opinion by the Attorney General.

Dear Sir:

I have your letter of May 25, 1939, in which you request my opinion as follows:

"It has come to my attention and to the knowledge of some of my Deputies that Alcoholic Beverages are being transported through this county from one A. B. C. store to another. Also I have reason to believe that wholesalers for malt beverages are transporting same through this county.

"Please advise me whether or not under the existing Prohibition Laws as amended by various acts I have the legal right to apprehend such parties who transport such beverages through Hale County, Alabama."

For the purpose of clarity, your inquiries, two in number, will be here restated:

1. May the Alabama Alcoholic Beverage Control Board legally transport alcoholic beverages which it desires to sell, and has a legal right to sell, from its warehouses in a wet county, through Hale County, a dry county, to its State Liquor Stores in another wet county, there to be sold in the manner provided in the Alabama Beverage Control Act?

2. May wholesalers or distributors of malt or brewed beverages, licensed to sell and deliver the same to any licensed retail dealer in malt or brewed beverages anywhere in the State of Alabama, transport such beverages from their warehouses in a wet county, through Hale County, a dry county, to a licensed retail dealer in such beverages in a wet county, to be sold by him in the manner provided in the Alabama Beverage Control Act?

The answers to these questions evolve upon a determination of the question of whether or not the Alabama Beverage Control Act is effective in

any way in a dry county, and whether or not the positive prohibitions contained in our statutory laws as it existed at the time of the passage of said Alabama Beverage Control Act against transportation of alcoholic beverages of any kind, in any amount, in any manner, for any purpose, anywhere in the State of Alabama (and the possession of the same while being so transported) (exceptions as to near beer and liquors for medicinal purposes not being here material) have been modified or repealed in a dry county by the provisions of said Act so as to permit transportation through a dry county in the manner outlined in your inquiries. The prohibitions against transportation (and possession while being transported) of alcoholic beverages were a part of "The prohibition laws of Alabama in existence before the Alabama Beverage Control Act was enacted" which "were complete in every detail," and "are set out in Chapter 167, Code, consisting of sixteen articles—Sections 4615 to 4800, and those enacted subsequent to the Code of 1923."

The identical questions propounded by you have never been passed upon by this office or by the appellate courts of this state. The Supreme Court and the Court of Appeals, however, have considered the effect of the Alabama Beverage Control Act on the existing prohibition laws in the dry counties in this state in two decisions. I refer to the cases of **Welder Williams vs. State,** 179 So. 915, and **Burdette Holt vs. State,** MS., (not yet reported).

The case of **Welder Williams vs. State,** supra, written by Judge Rice of the Court of Appeals, whose opinion the Supreme Court refused to reverse, (235 Ala. 520, 179 So. 920), held that the Alabama Beverage Control Act did not go into effect in dry counties, i. e., those counties who voted to retain the existing prohibition laws.

In that case, the defendant Williams was indicted and tried for the offense of illegally having in his possession prohibited liquors. The defendant, on his trial, offered as his defense the admitted fact that the beer in question all had the State stamp on it and that the beer had been legally purchased by appellant in an adjoining county where its sale was permitted by law. The defendant was charged with possessing the beer in Walker County, which is a dry county, or a county wherein the majority of the electors voting in the election provided for in Section 51 of the aforementioned "Alabama Beverage Control Act" voted "No."

I quote from the Williams case, supra, as follows:

> "The case was tried in the court below by the judge, sitting without a jury. So, stripped of a few unimportant technicalities, the question is squarely posed here: 'May one, otherwise guilty of a violation of the terms of Code 1928, Section 4621, by having in possession any of the liquors described therein, have in possession in a "dry" county, as that term is defined by the said Alabama Beverage Control Act, whiskey or beer—instantly, beer—which has been legally purchased from a legally authorized selling agency in a "wet" county, as defined by the same act, without being guilty of a violation of the criminal laws of our State?' Code 1928, Sections 8598, 8599.
>
> "We believe we are not unaware of the importance of this question. We know we are not unaware of the welter of conflicting opinions regarding its correct answer which has rolled over our state ever since the passage of the Alabama Beverage Control Act.

"But we shall look for our answer not in an analysis of the large number of such opinions which have been presented for our perusal on this appeal, interesting as that analysis would prove. We turn, rather, to the statutes themselves—the Alabama Beverage Control Act, and prior existing laws.

"It is not controverted that, before the passage of this Alabama Beverage Control Act, there reposed in the written laws of our state a positive prohibition, coextensive with the boundaries of the state, of the possession of 'beer' such as is involved here (it not being claimed or shown that said 'beer' came within the exception to such 'prohibition' permitted by act of the Legislature passed over the veto of Governor Miller on October 6, 1932, found in Gen. Acts Alabama Extra Session 1932 at page 56, and known as the 'Near Beer Law'). This prohibition is found in Code 1928, Section 4615, in connection with same Code, Section 4621.

"So, if the 'possession' here shown to have been found in appellant be held to be legal it must be because the 'prohibition' contained in the sections of the Code of 1928 we have cited has been repealed by the Alabama Beverage Control Act.

"The only statutory enactment existing at the time of the passage of the said Alabama Beverage Control Act that was specifically repealed by that act was one, not here important, described as 'Article 5 of chapter 167, Code of 1923', Code 1928, Section 4666 et seq., having to do with advertisements of prohibited liquors and beverages.

"If any other statutory laws of our state, existing when the Alabama Beverage Control Act was passed, the pertinent parts of Code 1928, Sections 4615 and 4621, included, were repealed thereby, it was only because their terms or provisions found themselves in conflict with the terms and provisions of the Alabama Beverage Control Act. As it is expressed in said act—but, as we understand the authorities, would have been the case, anyway—'all laws and parts of laws in conflict herewith, either special or general except as herein otherwise specially provided are hereby repealed.' Section 61.

"Now if the pertinent parts of Code 1928, Sections 4615 and 4621, are repealed by the last next above sentence, it must be by implication, because they are 'in conflict' with the provisions of the Alabama Beverage Control Act. * * *

"As mentioned hereinabove, under the provisions of section 51 of the said act (and when we use the word 'act' we mean the Alabama Beverage Control Act), a referendum was held—in all respects, so far as appears, in accordance with the terms thereof—and the Governor, as directed, by proclamation dated March 17, 1937, declared the act in effect in some twenty-four of the sixty-seven counties of the state. Of these twenty-four counties, Walker was not one.

"As to it, i. e., Walker County, a majority of the electors thereof having voted 'No' to the question 'Do you favor the legal sale and distribution of alcoholic beverages in this county?' submitted in the referendum mentioned above, it is expressly provided by the terms of the Alabama Beverage Control Act, itself, section 51, that 'this act shall **not** go into effect in such County.' (Italics ours)

"The provisions of Codes 1923 and 1928, Sections 4615 and 4621, being all the while in full force and effect in Walker County, and the provisions of the Alabama Beverage Control Act being definitely not in effect in Walker county, it is rather interesting to follow the reasoning by which some reach the conclusion that it is no longer a violation of the laws of our state for one such as appellant to be in possession of alcoholic beverages such as are here involved in said county. We consider such reasoning fallacious—we will not say specious, and will elaborate but briefly.

"Doubtless it is by now, from what we have said, obvious that the counties of the state wherein the act is declared to be in effect are designated in said act (and are) 'Wet' counties, whereas the counties of the state wherein it is not in effect are designated therein (and would be, apparently) 'Dry' counties. Anyhow, such is the fact. * * *

"Now, because in no reference contained in the act to 'alcoholic beverages in dry counties' is there a mention of 'possession'; and because nowhere in the act is there a 'restriction on, or a prohibition against' the possession of legally purchased alcoholic beverages in a dry county; and because the Legislature did expressly in the act preserve—as if it needed such express preserving—it not being repealed in the first place—the prohibition theretofore existing against the 'manufacture, sale and distribution' of alcoholic beverages in dry counties, we are asked to conclude that it was the intention of the Legislature to repeal the hitherto existing positive, specific prohibition of the 'possession' of alcoholic beverages in the counties of the state wherein said act did not go into effect.

"But the binding force of the valid enactments of a prior Legislature, Code 1928, Sections 4615 and 4621, is not, we believe, to be gotten rid of by any such method. * * *

"We have searched the Alabama Beverage Control Act word by word, line by line, section by section, from its beginning to its end. Nowhere, in any section, do we find a provision 'irreconcilably inconsistent' with the provisions of Code 1928, Section 4621, in so far as appellant is concerned.

"Without tediously further prolonging our opinion, we are clear to the conclusion that it is altogether 'practicable' to construe the Alabama Beverage Control Act in such a way that both it and Code 1928, Section 4621, 'may stand together' and not 'conflict'—in a 'dry' county, such as Walker.

"A little more specifically, it is our view that a proper construction of said act is that it applies solely to the 'wet' counties of the state—that is, certainly, in so far as all such as appellant are concerned. But that even if it be conceded—which we do not concede—there are those in 'wet' counties 'licensed' to 'sell or deliver vinous or malt or brewed beverages, in sealed containers anywhere within the State of Alabama,' this provision—if it affected appellant—which it does not—would still not be sufficient to repeal the law as embodied in Code, Sections 4615 and 4621, supra. 37 C. J. 244, Section 105.

"We answer the question we have posed in the sixth paragraph of this opinion in the negative; * * *"

If the opinion above quoted from was the only expression of our courts on the effect which the Alabama Beverage Control Act has on the prohibition statutes in existence at the time of its adoption, I would be constrained to the conclusion that both of your inquiries should be answered in the negative.

The Supreme Court of this state, however, in the Burdette Holt case, supra, has very recently modified to some extent the opinion prepared by the Court of Appeals in the Welder Williams case. In the Burdette Holt case, the Supreme Court was dealing with the question as to whether or not the provisions of Section 47 of the Alabama Beverage Control Act were in force and effect in the dry counties of the state. Sections 47 is as follows:

"Counterfeit Stamps, Crowns or Lids: That whoever manufactures, buys, sells, offers for sale, or has in his or its possession any reproduction or counterfeit of the Alabama Revenue Stamps, Crowns or Lids provided for in this Act, or stamps, crowns or lids used to identify articles sold and/or distributed by State Liquor Stores, is guilty of a felony and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than a year and a day, nor more than ten (10) years, and in addition, may be fined not less than Two Thousand ($2,000.00) Dollars, nor more than Ten Thousand ($10,000.00) Dollars."

The Supreme Court, among other things, said in the Burdette Holt case as follows:

"We have heretofore held that the Act is not effective in a 'dry' county, so as to authorize the possession of such liquor in that county by one who purchased it in a 'wet' county under authority of the Act.—**Williams v. State,** 179 So. (Ala. App.) 915, certiorari denied 179 So. 920. That case gave emphasis to that feature of section 51, **supra,** which provided that 'this Act shall not go into effect in such (so called dry) county, and all laws prohibiting the manufacture and sale of alcoholic liquors or beverages now in force in effect in Alabama, shall remain in full force and effect in every such county.' And in the same section as to dry counties, 'the statutes of Alabama prohibiting the manufacture, sale or distribution of alcoholic beverages shall remain in full force and effect.'

"Section 47, **supra,** was enacted to prevent evasions of tax features of the law, **and if it does not apply in a dry county it would lose its value to a large extent and not accomplish the evident intent of the Legislature.**

"There are other features of the Act which have application to dry counties notably section 48, which provides for licenses to be issued for the sale in certain kinds of railroad cars for consumption while en route on the railroad. **There may be others which we will not undertake to find.**

"The act should not be controlled by any certain isolated extracts from it, but rather by a study of the animating current which permeates it.

"The prohibition laws of Alabama in existence before the Alabama Beverage Control Act was enacted were complete in every detail. Many features existed merely to prevent evasions. An indictment in broad language was held to be sufficient and to embrace any device or substitute. —Section 4644, Code; **Noltey v. State,** 225 Ala. 584, 144 So. 457. They are set out in Chapter 167, Code, consisting of sixteen articles—sections 4615

to 4800, and those enacted subsequent to the Code of 1923. Their purpose is declared to be to suppress the evils of intemperance. They create many offenses both felonies and misdemeanors.—See, **Slater v. State,** 230 Ala. 320, 162 So. 130.

"When the Alabama Beverage Control Act, section 51, provided that it shall not go into effect in a dry county, and that all laws prohibiting the **manufacture and sale** of alcoholic liquors shall remain in force in them, we think it meant, as stated by the Court of Appeals in the **Williams case, supra,** that the said Act should not be there effective to the extent that it conflicts with existing laws which suppress the evils of intemperance and prohibit evasions and subterfuges and which provide for crimes and penalties and prescribe remedies, including the entire body of such laws, except as may be otherwise apparent in it. This does not prevent the application in dry counties of such features as were evidently intended to apply there.

"We are clear to the conclusion that section 47, **supra,** is of the latter class and has effect in dry counties, as a proper interpretation of the language of section 51, **supra."** (Emphasis ours)

I am of the opinion that it was the intention of the Legislature that liquor and beer could be legally sold in every county of Alabama wherein the majority of the qualified electors of the county so expressed themselves at the polls as provided in Section 51 of the Act. If transportation of liquor and beer from a wet county through a dry county into another wet county is illegal, then Cullman and Jefferson Counties in this state cannot legally obtain liquor and beer, even though the sale and possession thereof is not illegal therein.

I am of the opinion that the questions raised by you are "other features" of the Alabama Beverage Control Act which have application in dry counties, as the Supreme Court intimated in the Burdette Holt opinion. Any other conclusion, in my judgment, would absolutely nullify the very evident intent of the Legislature.

I am of the opinion that a careful reading of the Alabama Beverage Control Act demonstrates that the Legislature intended for the Alabama Beverage Control Board to have the legal right to transport alcoholic beverages which it desires to sell and has a legal right to sell, from its warehouses in a wet county, through a dry county to a State Liquor Store in another wet county.

I am of the same opinion as to the right of wholesalers or distributors of malt or brewed beverages to transport such beverages from their warehouses in a wet county **through** a dry county, to a duly licensed retail dealer in such beverages in a wet county, to be sold by him in accordance with the terms of the Alabama Beverage Control Act.

I am sure you understand, Mr. Sheriff, that the opinion of this office is not necessarily the law of this state. The construction which this office places upon a statute is merely the opinion of the legal department of the state and in no way can be considered as the law on the question. The courts of this state, of course, are the only agencies of the State which can finally determine what is the proper construction of a statute.

The opinion which I have expressed herein is not, in my judgment, in conflict with the decisions of our courts, but on the contrary, in my judgment it follows the latest decision of our courts, which recognizes the fact that there are certain provisions of the Alabama Beverage Control Act which must apply in dry counties in this state in order to give effect to the obvious intention of the Legislature. Certainly, it would be an anomolous situation for an act to provide for the possession and sale of intoxicating liquors and beverages in this state in those counties voting wet and then also provide that such liquors and beverages could not legally be delivered thereto.

I am aware of the fact that the conclusion here reached will require the sheriffs of the state to be ever watchful for evasions of the law. No doubt some will attempt to transport liquor and beer into and through dry counties for illegal purposes, under the protection of this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 11, 1939.

Hon. A. H. Collins,
Superintendent of Education,
Montgomery, Alabama.

Schools—Department of Education may pay traveling expenses of the employees of another department of the State while performing duties of the Department of Education.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion of June 27, 1939, is as follows:

"We are engaged at present in a campaign, in cooperation with the Department of Conservation and the office of the Examiner of Public Accounts attempting to clear title to school land in Alabama and other work regarding the school's interest in this land.

"For the past several months the Divisional Law Officer of the Department of Conservation, Division of Forestry has been assisting in this campaign. Will you advise me if the Department of Education can legally pay the expenses of this officer while traveling in connection with this work."

I am of the opinion that your inquiry should be answered in the affirmative.

Section 648 of the School Code of 1927 provides as follows:

"648. Agents May Be Appointed to Map School Lands—The State Superintendent of Education may appoint agents for surveying, mapping,

or plotting school lands, for estimating the timber or minerals thereon, and for the performance of such other duties, as may be assigned them by the State Superintendent of Education for the protection of the best interests of the schools, and for the collection of notes for purchase money of land, being responsible for any neglect on the part of such agents."

Section 3 of Act No. 211, H. 648, approved July 10, 1935, (General Acts 1935, p. 598) provides as follows:

"Section 3. EXPENSES OF THE STATE DEPARTMENT OF EDUCATION. Any funds or appropriations which are now available or which may hereafter be made available to the State Superintendent of Education, the State Board of Education, or the State Department of Education for use in operating, maintaining, or providing for the expenses of the State Department of Education shall be expended in accordance with an annual budget adopted by the State Board of Education upon recommendation of the State Superintendent of Education, provided the total amount of such budget shall not exceed the appropriations of funds available during that year. Such funds or appropriations shall be expended for the salaries and expenses of the executive, supervisory, or clerical personnel and **for other essential purposes,** including compensation and expenses of the members of the State Board of Education in the discharge of their official duties as provided by law." (Italics supplied)

This last quoted section authorizes expenditures for "other essential purposes", which in my judgment is sufficiently broad to include the traveling expenses of those performing duties under Section 648 of the School Code, supra, whether said persons are employees of the Department of Education or not. If it could pay the traveling expenses of its own employees for performing duties imposed on the Department by law, I see no reason why it could not pay the traveling expenses of the employees of another department of the State while performing such duties.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 11, 1939.

Hon. Jimmie Lee Craig,
President Jury Commission,
Lawrence County,
Moulton, Alabama.

Jury box—Custodian of keys.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion of June 8, 1939, which is as follows:

"I am President of the Jury Commission for Lawrence County, and note that the box shall have two keys, one to be kept by the President of the Commission, and it is with reference to the other key that I write you.

"In this County we have, of course, our Probate Judge, and then we have two Circuit Judges, one living in Morgan County and the other in Cullman County. We do not have any other judge of a court of record having juries other than the probate or circuit court.

"Should the other key to our jury box be given to our Probate Judge, or to one of the Judges of the Circuit Court?"

It is my opinion that the other key to your jury box should be kept by the Judge of the Lawrence County Court.

General Acts 1939, Act No. 59, Section 13, provides:

"The Jury Commission shall meet in the court house at the county seat of the several counties as soon after the approval of this Act as is practicable and thereafter on the first Monday in October in each year, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the Jury Commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the Jury Commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on one card. These cards shall be placed in a substantial metal box provided with a lock and two keys which box shall be kept in a safe or vault in the office of the probate judge and if there be none in that office, the Jury Commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the Commission, and one of said keys thereof shall be kept by the President of the Jury Board. The other of said keys shall be kept by a judge of a court of record having juries other than the probate or circuit court and in counties having no such court then by the judge of the circuit court for the sole use of the judges of the courts of said county needing jurors.

"The jury roll shall be kept securely and for the use of the Jury Commission exclusively. It shall not be inspected by any one except the members of the Commission or by the Clerk of the Commission upon the authority of the Commission, unless under an order of the judge of the circuit or other court of record having jurisdiction."

It will be noted that this section provides that the other key shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court, then by the judge of the circuit court. The County Court of Lawrence County, Alabama was established under the general authority for establishing county courts. However, the court was further regulated by Local Acts of 1890-91 p. 362 and

Local Acts of 1919 p. 86. These Acts provide among other things for juries for said court. They also provide that appeal shall be taken from Justice of Peace Courts to this court in misdemeanors. Appeals are taken direct from this court to the Court of Appeals. Such courts as this one under authority of State ex rel Vandiver vs. Burke, Judge, 175 Ala. 561, 57 So. 870, and Cook vs. Burke, 177 Ala. 155, 58 So. 984, are considered courts of record. So the County Court of Lawrence County is a court of record having juries.

Therefore, there being a court of record having juries other than the probate or circuit, the other key should be given to the judge of said county court, who is in this case the judge of probate also.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 11, 1939.

Hon. Robert Locke,
Sheriff, Choctaw County,
Butler, Alabama.

Jails—The sheriff is without authority of law to purchase coal or other fuel for heating of jail unless authorized by an appropriation to do so by the Commissioners Court.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 6, 1939, in which you request my opinion as follows:

"Please advise me how I can obtain payment for fuel purchased and used in the County Jail. In this instance the amount of fuel purchased was not sufficient, and I was compelled to secure more fuel.

"Is not the Court of the County Commissioners required to order that I be reimbursed for the amounts expended for said fuel?

My answer to the above, based on the authority of **Escambia County v. Dixie Chemical Products Co.,** 229 Ala. 287, 156 So. 631, is in the negative, that is to say, you do not have such claim as can be enforced by a suit at law. Justice Foster in rendering the opinion of the Court, held in substance that statutes making it the duty of the county commissioners to appropriate money for the purpose of enabling the sheriff to keep jail "clean and free from offensive odors" and extending priority of claims, held not to authorize the purchase by sheriff of disinfecting materials without an appropriation by the county commissioners.

Of course, this opinion is based on a purchase by the sheriff of fluids for disinfecting purposes, but the principle is the same here. However, should the court of county commissioners allow your claim and pay the same, the amount so paid could not be charged back to such court as it is authorized to pay equitable claims such as you have here under the authority of Section 186, Code of Alabama 1928 (Michie), which is as follows:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, to reimburse any person, firm or corporation, who in good faith has performed service, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, To refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication, or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 11, 1939.

Hon. H. E. Kendrick,
Tax Collector,
Dallas County,
Selma, Alabama.

Taxation—Under Sections 55-58 of the 1935 Revenue Act, the tax assessor must furnish the tax collector with an abstract showing the assessments of State, county and special taxes (including municipal taxes if the property is located in a municipality and said municipality has elected to avail itself of the State and county machinery for the assessment and collection of taxes pursuant to the provisions of Section 201 of the 1935 Revenue Act, as amended by Act No. 57, General Acts 1939, approved February 27, 1939).

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 26, 1939, in which you request my opinion as follows:

"Please give me your opinion as to whether or not it is the legal duty of the Tax Assessor to give to the Tax Collector an abstract of County and Municipal assessments as well as State abstract, as per Sections 55 to 58 both inclusive, pages 38-39 and 40, Revenue Code of 1935, especially Section 57, page 40.

"It seems to me that it is necessary that the Tax Collector have an abstract of all assessments in order that he may check the book of collections against the totals charged to him in abstracts.

"The State department has recently mailed out to the assessors blank abstract forms to be used in making abstracts of Motor Vehicles, and I am attaching one of these forms. You will note that these blanks provide space for State, County and County School Tax, and if it applies to Motor Vehicle, why not to all other property tax abstract of assessments. Please advise."

Sections 55, 56, 57 and Section 58, in pertinent part, of the 1935 Revenue Act read, respectively, as follows:

"Section 55. The Tax Assessor must make and enter in an assessment book, suitably ruled and substantially bound, in forms as prescribed by the State Tax Commission, a condensed statement of all assessments made during each tax year, showing in separate columns the name of the owner, a description of the real estate and improvements thereon, the assessed value thereof, and the value of the personal property assessed for taxation; **and the assessor shall compute and enter opposite the name of each taxpayer the aggregate amount of State, county and special taxes with which such taxpayer is charged. When the hearing of objection to assessments has been completed as herein provided, the Tax Assessor shall complete the said book by making the proper entries therein, and foot up at the bottom of each page the aggregate of all such taxes.** When appeals have been taken to the circuit court, as herein provided, this fact must be stated. Provided that in counties where assessors are now allowed by law to use assessment lists in lieu of a book of assessments, the assessor shall not be required to prepare a book of assessments as provided for in this Section, but in lieu thereof shall be required to arrange in alphabetical order original assessment lists, and cause the same to be permanently bound, and such assessment lists when bound, shall constitute the book of assessments as herein provided, and the certificate of the State Tax Commission, or the agent or assistant thereof provided for in the next section, shall be entered upon each of said bound volumes of assessments. Such assessment lists when bound shall be preserved permanently as a matter of record. **In making the tax collector's abstracts, such abstracts shall be made direct from the assessment lists."**

"Section 56. **After the book of assessments has been completed as herein provided, the State Tax Commission or the agent or assistant thereof shall certify on the book of assessments that the same has been examined and corrected by him by comparing the book of assessments with the tax returns showing final valuations, both as to items of property and amounts of assessments, and that the amount of state tax is $**_____ (here give amount) _____, **the amount of county tax is $**_____ (here give amount) _____, **the amount of special tax is $**_____ (here give amount) _____, **specifying the total amount of each of such taxes, and such certificate is**

to be the warrant to the tax collector of the county to proceed to collect such taxes in the manner directed by law."

"Section 57. **When the book of assessments has been completed as herein provided, the county tax assessor must without delay make out in triplicate upon forms to be furnished by the State Tax Commission, a complete abstract of all real and personal property as contained in the assessment book of his county, showing the total amount and value of each class of taxable property, and property exempt from taxation, and the amount of taxes on each item, extended in a column such abstract of assessment must be approved and certified to by the State Tax Commission, one of which the said tax assessor must forward to the State Comptroller not later than the second Monday in August of each year, one to the State Tax Commission, at Montgomery, and the other he must deliver to the tax collector by said date.** The State Comptroller shall report to the Governor any tax assessor who for five days after the date required has failed to forward to the State Comptroller the abstract of assessment of his county, and the Governor shall forthwith require of such Tax Assessor an official report of the cause of such failure."

"Section 58. **After the book of assessments has been completed as herein provided, the Tax Assessor must enter in a book in concise form, the amount of taxes assessed against each taxpayer, showing separately the amount of taxes on real estate and personal property and other subjects of taxation, and the total amount of tax due, and the address of the taxpayer and the fees of the assessor with a blank for the fees of the collector, and such book he must turn over to the tax collector on or before the fifteenth day of September.** * * *" (Emphasis supplied)

It is crystal clear from the provisions of the above quoted sections of the 1935 Revenue Act that if the abstract which the tax assessor is required to furnish to the tax collector is made in conformity with said sections, that said abstract will show the assessments of State, county and special taxes, and not just State taxes (the assessments for municipal taxes will also be shown thereon if there is any property located in a municipality which has elected to avail itself of the State and county machinery for the assessment and collection of its taxes pursuant to the provisions of Section 201 of the 1935 Revenue Act, as amended by Act No. 57, General Acts 1939, approved February 27, 1935. See opinion to Hon. J. Collier Merrill, Tax Collector, Covington County, Andalusia, Alabama, under date of May 27, 1939, a copy of which is enclosed herewith for your convenience). Your attention is further directed to the fact that the ad valorem tax on motor vehicles is assessed and collected in the manner provided in Schedule 158.12 of Section 348 of the 1935 Revenue Act, and that said tax is not assessed and collected as the ad valorem tax on other real and personal property is assessed and collected.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 11, 1939.

Hon. S. C. Tatum,
County Health Officer,
Cherokee County,
Centre, Alabama.

Alabama Alcoholic Beverage Control Board Funds—Use of by the County.

Board of County Commissioners may allot Alabama Alcoholic Beverage Control Board funds at its discretion for Public Health, Old Age Pensions, or for other purposes of the County Department of Public Health.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of May 1, 1939, in which you request my opinion as follows:

"Please be so kind as to let our Department know if the Board of County Commissioners have a right to give all the A. B. C. tax coming to our County to the Welfare Department over our protest.

"The law says it shall go for public health, Old Age Pensions and other Welfare objects. The Welfare Department has been given every dollar up to now that has come in our County. Please give us a ruling on this at once if possible so I can take the matter up with them next Monday."

The act creating the Alabama Alcoholic Beverage Control Board, Acts of 1936-37, page 40, provides in Section 9(c) for the allotment of net profits to the counties and for their use by the counties as follows:

"9(c). The net profits derived from the proceeds of the State Liquor Stores under the provisions of this Act shall be paid out and applied monthly as follows: Fifty percent shall be covered into the General Fund of the Treasury of the State; ten percent shall be covered into the Treasury of the State to be used and the same is hereby appropriated exclusively for Old Age Pensions, and for other purposes of the State Department of Public Welfare. Ten percent shall be covered into the Treasury of the State to the credit of the sixty-seven Counties of the State and shall be divided equally among each of said counties, and shall be paid to them and shall be covered by them into their respective General funds; **ten percent shall be paid into the Treasury of the State to the credit of the sixty-seven counties of the State, and shall be divided equally among each of said counties and shall be paid to them to be used by them exclusively for the purposes of Public Health, Old Age Pensions and for the other purposes of the County Departments of Public Welfare;** twenty percent of the net profits of each Liquor Store to be paid to the municipality in which such State Store is located. Payment to be made to each of the several counties and incorporated towns and cities by warrant of the State Comptroller not later than the 20th of each month following collection. * * *" (Emphasis supplied)

The Board of County Commissioners has the power to appropriate the funds received from the Alabama Alcoholic Beverage Control Board for the three uses specifically named and for no others; but the wording of the act implies that the money may be appropriated for any one or any two of these purposes as well as for all three within the discretion of the Board of County Commissioners. Cf. Biennial Report of Attorney General, 1936-38, p. 682. **Bowden v. Ricker,** 70 Fla. 154, 69 So. 694.

There is, in my opinion, no way in which the Board of County Commissioners can be made to appropriate money derived from the Alabama Alcoholic Beverage Control Board to your department.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 12, 1939.

Hon. Joseph E. Killough,
Chief Clerk, Division of Labor,
Department of Industrial Relations,
Montgomery, Alabama.

Workmen's Compensation Act—

Clerks of the Circuit Courts come within the purview of Section 4002 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated June 19, 1939, which follows:

"We are interested in determining whether or not the penalty for failing to make reports as stated in Section 4002 of the Workmen's Compensation Law of Alabama applies to clerks of Circuit Courts, as referred to in Section 7593.

"We quote these two sections as follows:

" '4002. FAILURE TO MAKE REPORTS.—Any person required under the workmen's compensation law to make reports in writing of a misdemeanor and on conviction may be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months and must be fined not more than five hundred dollars.'

" '7593. CLERK OF CIRCUIT COURT REPORTS TO COMMISSIONER.—The clerk of the circuit court shall within 10 days after the

disposition of any case in his court make a report in writing, giving the details of such disposition, and mail the same to the compensation commissioner of Alabama on blanks to be procured from the commissioner for such purpose.'

"We shall appreciate your rendering a decision on this question as soon as possible."

In my opinion, the clerks of the Circuit Court of this State come within the purview of Section 4002 of the 1923 Code of Alabama.

Act No. 245, S. B. 53, approved August 23, 1919 (General Acts 1919, p. 206), provides in part as follows:

"Liability of party other than employer; procedure.—37. The clerk of the circuit court shall within ten days after the disposition of any case in his court make a report in writing, giving the details of such disposition, and mail the same to the compensation commissioner of Alabama on blanks to be procured from the commissioner for such purpose."

"40. Penalties.—(11) Any person required hereunder to make reports in writing who wilfully fails to make such reports shall be guilty of a misdemeanor and on conviction may be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months and must be fined not more than five hundred dollars."

The above-quoted provisions of Act No. 234 were brought forward in the 1923 Code of Alabama as Section 7593 and 4002.

In my opinion, the Legislature by providing in Section 4002 of the 1923 Code of Alabama that "any person required under the Workmen's Compensation Act to make such reports" expressly included clerks of the Circuit Court, and they come within the purview of said section.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1939.

Hon. Robert Locke, Sheriff,
Choctaw County,
Butler, Alabama.

Sheriff's Fees—Removing Prisoners—

It is the duty of the commissioners' court to pay sheriffs their removal bills for removing prisoners from one county to another for trial on the proper presentation and proof of their claims. If the

budget made by said commissioners' court fails to include this item, they may amend it at any time so as to make provision for such claims.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 6, 1939, in which you request my opinion as follows:

"Section 3741 of the 1923 Code of Alabama provides that Sheriffs are to be paid for the removal of prisoners from one county to another county in the state by the county, when said prisoners are charged with a misdemeanor, and that if such prisoners are convicted, the removal cost shall be taxed against him by the Clerk of the Court and when paid, said cost shall be paid to the County Treasurer.

"I have several removal bills of this kind and the County Treasurer advises me that he can not pay same due to the fact that no provisions have been made in the budget set up by the Commissioners' Court.

"Please advise me how I should be paid for my services in this connection where the prisoners have been convicted and also if the prisoner is not convicted."

You are entitled to your removal bills in all misdemeanor cases where a defendant is removed from one county to another for trial. This is payable under Section 3741, Code of Alabama, 1923. I quote from said section:

"For removing any prisoner upon a change of venue granted in his case, or who is arrested on a warrant issued by a justice of the peace, or on an indictment, and confined in a county other than that in which he is triable or arrested for contempt, or as a defaulting witness, three dollars for himself or his deputy acting in his stead, and two dollars for each guard for each day they are respectively engaged in such removal, together with the actual necessary traveling expenses of himself or deputy, and guard or guards, and prisoner or prisoners, while on the trip, by the nearest route usually traveled between the points from and to which such removal is made, to be paid by the state in case of felonies, and by the county when the offense committed is a misdemeanor, upon his sworn statement and account therefor, accompanied by a certificate of the clerk of the court in which the prisoner is, or will be, triable, that such fees have been reported to and docketed, or will be docketed by him. If such prisoner is convicted the clerk of the court in which conviction is had shall tax the costs of such removal against him, and shall immediately upon the adjournment of the court, issue execution therefor, and for the other costs, and deliver the same to the sheriff of his county, and such sheriff, upon the collection of the costs of such removal, shall pay the same over to the state treasurer."

You are not responsible for the court of county commissioners inadvertently leaving this out of the county budget. The court of county commissioners can amend their budget so as to include this item at any time it

becomes necessary. This office has so held. Quarterly Report of Attorney General, Vol. V, page 71; Quarterly Report of Attorney General, Vol. VIII, page 111; Quarterly Report of Attorney General, Vol. X, page 88.

It is my opinion that this expense is a preferred claim under Section 231, Code of Alabama, 1923, as amended, where this section says:

"Compensation of the probate judge, the sheriff, tax assessor, clerk of the circuit court, jury commission and deputy solicitor for services performed by them and authorized to be paid to them by law."

See **Allen v. Watts,** 88 Ala. 497, 7 So. 190.

The section above quoted from has reference to preferred claims and the order of their payment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1939.

Hon. Roy D. McCord, Member,
House of Representatives,
Etowah County,
Gadsden, Alabama.

Statutes—Schools

The local act in the form of relief act, which is properly advertised, properly drawn as to form and substance and properly passed by the Legislature, authorizing a county board of education to assume an obligation of a municipality, which obligation is not a legal obligation of the county board of education but a moral one, would be constitutional; and said county board of education would be authorized to pay the obligation so assumed out of any money which is not otherwise pledged or appropriated for other purposes.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 20, 1939, in which you request my opinion as follows:

"On April 15, 1939, your opinion on the following question was mailed to me:

" 'Would a local bill granting the Etowah County Board of Education the permissive right to assume an obligation of the City of Attalla for a Twenty thousand dollar ($20,000.00) bond issue now outstanding, same

being issued for the building of the Etowah County High School at Attalla, under the 1907 County High School Act It being the purpose and objective of the City of Attalla to use this relief in the building of the City School building for the City of Attalla.'

"Your opinion was that a local act in the form of a relief act, if it is properly advertised, properly drawn as to form and substance, and properly passed by the Legislature, effectuating the purpose set out in the above inquiry, would be constitutional.

"It now becomes necessary that I have your opinion on the following question, relative to the same matter:

" 'Could the Etowah County Board of Education constitutionally pay out of the treasury of said Board the sum of Twenty thousand dollars ($20,000.00) from any money in said treasury which is not heretofore pledged or appropriated for other purposes, for payment on said Etowah County High School under the power and authority granted by a bill in the form of a relief act, which is properly advertised, and properly drawn and passed by the Legislature authorizing said expenditure?' "

I am of the opinion that your inquiry should be answered in the affirmative. The opinion referred to in your letter of April 15, 1939 held that the proposed act as one under consideration would be constitutional. By holding said act to be constitutional, it necessarily follows that moneys may be expended in accordance therewith. Therefore, if so authorized in the proposed bill the county board of education could legally pay from its funds, which are not otherwise pledged or appropriated the amount authorized by said bill.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1939.

Hon. S. P. Povner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Counties—

Commissioners Court not authorized to appropriate money for historical marker.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of June 13, 1939, which is as follows:

"The Daughters of the American Revolution has made application to the Board of Revenue for an appropriation toward the placing of an historical marker in the lower part of this County and also stated that they would ask for appropriations from Henry, Houston and Dale Counties for markers in Dale and Henry Counties.

"Please advise me if the Board of Revenue has authority to make appropriations for historical markers in this County.

"Please advise me further if they have authority to make appropriation toward the establishment of historic markers in other Counties than Houston."

It is my opinion that the County Board of Revenue does not have authority to make appropriations for historical markers either in their own or other counties. The law is well settled that counties are governmental agencies of the State chargeable with and liable for only those claims and demands which the law imposes upon them or authorizes them to contract. The power of the Board of Revenue is only coextensive with the power expressly granted by the statute, or necessarily or reasonably implied therefrom. **Weakley et al vs. Henry,** 204 Ala. 463, 86 So. 46; **Stevens vs. Hawkins,** 202 Ala. 499, 80 So. 801; **Ensley Motor Car Co. vs. O'Rear,** 196 Ala. 481, 71 So. 704.

This office held in Biennial Report of Attorney General, 1932-1934, p. 462, in an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, that the Commissioners Court was not authorized to make an appropriation to help erect a monument to the Confederate Soldiers.

There being no provision either express or implied whereby the County Board of Revenue can appropriate money for an historical marker, it naturally follows that an appropriation for such purpose would not be valid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1939.

Hon. J. W. Sharpton, President,
Board of Revenue, Etowah County,
Gadsden, Alabama.

Hospitals—Guarding prisoners therein—

1. Fees claimed by guards for guarding prisoners while confined to hospital are legal claims against the county.

2. Hospital expenses for prisoner when prisoner escapes and is wounded in escaping, and voluntarily enters a hospital, not a legal claim against a county.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of June 20, 1939, requesting my official opinion as follows:

"The Board of Revenue of Etowah County desires your opinion on the following matter:

"One Huie Lee Hodge, while confined in the jail of Etowah County under an indictment by a grand jury of this County for the offense of robbery, escaped from said jail, without fault on the part of the Sheriff. After his escape, he assaulted a deputy sheriff of this County by shooting at him while said deputy was undertaking to recapture him. This occurrence took place in Etowah County, and, in the attempt to recapture Hodge, the deputy sheriff shot him in the hand. Hodge evaded the attempt to recapture him, and was later located by the sheriff of Etowah County in the Hillman Hospital in Birmingham, Jefferson County, Alabama, where he had been admitted on his own responsibility, and was undergoing treatment for the wound inflicted in the manner above stated. Immediately after Hodge was located in the hospital, a written order was given to the sheriff of Etowah County, by Honorable W. M. Rayburn, one of the Judges of the Circuit Court, directing the sheriff to keep sufficient guards, day and night, over Hodge in said hospital to insure his safe keeping, in order that he might be returned to Etowah County to face trial for the offense alleged to have been committed by him, and further directing his removal from the hospital to the Jefferson County jail, or some other jail strong enough to hold said prisoner, as soon as the physical condition of the prisoner would allow. The sheriff found that Hodge could not be removed from the Hillman Hospital, due to his physical condition, and, therefore, placed a day guard over him at the cost of $5.00 per day, and a night guard over him at the cost of $5.00 per night. There has accumulated to this date for such guard services something in excess of $245.00, and, it appears according to the advice of the doctors treating Hodge that he will have to remain in said hospital two or three weeks longer.

"The question to which the Board of Revenue of Etowah County desires your answers are as follows:

"1. Is the cost for the day and night guards, placed by the sheriff over the prisoner at the Hillman Hospital in Birmingham, Jefferson County, Alabama under the facts heretofore stated, a legal claim against Etowah County, and should said expenses be paid by said County?

"2. Is the hospital expense, or any part thereof, a legal claim against Etowah County under the facts heretofore set forth, and should said expense, or any part thereof, be paid by the County?"

My answer to your first question is in the affirmative.

I call your attention to an opinion of this office rendered to the Hon. G. C. Brittain, Secretary of the Board of Revenue, Calhoun County, under

date of February 25, 1938, Vol. X of the Quarterly Reports of the Attorney General, page 106, in which opinion, this office ruled that, under the authority of Section 4812 of the Code of 1923, fees for guarding prisoners who had been moved to the hospital due to ill health are legal claims against the county and could be paid.

Therefore, based on the above cited opinion and the authorities therein cited, I am of the opinion that the guard fees mentioned in your request are legal claims against your county and may be legally paid.

My answer to your second question is in the negative.

You state in your request that Hodge entered the Hillman Hospital in Birmingham on his own volition, and was accepted by the hospital authorities without notice on their part that he was an escaped prisoner from Etowah County.

Section 4811 of the Code of Alabama, 1923, is as follows:

> "Section 4811. Removal of prisoners in ill health.—When the life or health of any prisoner, who is not confined under process from any court of the United States, may be seriously endangered by longer confinement in jail, and that fact, is made to appear clearly to any circuit judge, or to the judge of the county court of the county, such judge, must, by an order in writing, direct the sheriff or jailer to remove him to some suitable place, or hospital, as near as may be to the jail, and there safely keep him until his health is sufficiently restored to authorize his recommitment to jail."

It will be noted that this section applies only to prisoners who are removed from a county jail due to ill health, and does not apply to escaped prisoners who enter hospitals on their own volition, and are accepted by the hospital on their own responsibility. I am, therefore, of the opinion that the facts as presented in your request would not make your county legally liable for the hospital expenses incurred by Hodge.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 12, 1939.

Hon. Robert T. Simpson, Jr.,
Solicitor, 11th Judicial Circuit,
Florence, Alabama.

> Where a defendant is arrested by a police officer on mere suspicion and not under a warrant and later an affidavit is sworn out charging the defendant with the commission of a criminal offense on which a warrant is issued and placed in the hands of a constable to make arrest, which arrest is duly made and the defendant is tried

and convicted for the offense charged in the affidavit, then the arresting fee would go to the constable and not the police officer.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 21, 1939, in which you request my opinion as follows:

"Please advise me on the following question:

"The City police arrested several young men on suspicion of burglary. Confessions were procured by the city policemen from each of the men and larceny charges preferred and jail sentences imposed in each case.

"The affidavits for larceny were sworn out by the parties offended against and these warrants were executed by the constable, who removed the prisoners from the city to the county jail and made his return accordingly.

"The Justice of the Peace wants to know who is entitled to the arrest fees, the police officials who made the original arrest on suspicion without warrants or the constable who served the larceny warrants by transferring the prisoners from the city to the county jail."

It is my opinion that the fees for executing the warrant or writ of arrest should go to the constable as he was the officer who made the arrest under the authority of the warrant for the offense on which the defendant was tried. Section 3756, Code of Alabama, 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Officers—

Assistant Examiner of Accounts and member of County Board of Education are both offices of profit within contemplation of Section 280 of the Constitution of Alabama of 1901.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion, under date of June 16, 1939, which is as follows:

"Would you please advise me in answer to the following:

"Is it in violation of Section 280 of the Constitution of Alabama for an Assistant Examiner of Accounts to hold office as a member of a County Board of Education at the same time that he is employed by the State as an Examiner?"

It is my opinion that your inquiry must be answered in the affirmative. Section 280 of the Constitution of Alabama of 1901 provides as follows:

"Section 280. No person holding an office of profit under the United States, except postmasters, whose annual salaries do not exceed two hundred dollars; shall, during his continuance in such office hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public, and commissioner of deeds."

This office has heretofore ruled that a member of a County Board of Education held an office of profit within the contemplation of Section 280. Biennial Report of Attorney General 1934-36, page 42 Biennial Report of Attorney General 1928-30, page 12 Opinions of Attorney General, Book 18, page 98, Office Edition.

Therefore, the remaining question for solution is whether or not the office of Assistant Examiner of Accounts is an office of profit within the contemplation of Section 280 of the Alabama Constitution.

The test laid down in Biennial Report of Attorney General 1928-30, page 12, for determining when an office is an "office held under the State" is as follows:

"If the office is created, the officer appointed or elected, the powers prescribed, the duties defined by an act of the Legislature, the one holding such an office holds a public office in this State. Montgomery vs. State ex rel Enslen, 107 Ala. 382 Lacy vs. State 13 Ala. App. 227."

Section 739 of the 1923 Code of Alabama provides as follows:

"Section 739. Examiners appointed; term of office and bonds of.—A chief examiner and not exceeding seventeen assistant examiners may be appointed by the governor as may from time to time be necessary, to serve at his pleasure, and such appointments are revocable at his discretion. They shall be commissioned as other state officials; and they are required to furnish guarantee or surety bonds with one or more good and sufficient sureties, in the sum of three thousand dollars, each."

The above-quoted section has been amended as to the number of assistants and has been placed under different departments by various acts, but

the amendments do not affect the above-quoted section as far as this inquiry is concerned.

Therefore, it is my opinion that the office of Assistant Examiner of Accounts is an office of profit within the contemplation of Section 280 of the Alabama Constitution, and so no person could hold office as an Assistant Examiner of Accounts and as a member of a County Board of Education at the same time.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 12, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Audit—State Teachers College—

State Teachers College may lawfully pay for audit made in compliance with requirements for making application for membership in the Southern Association of Colleges and Secondary Schools.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of June 19, 1939, in which you request my opinion as follows:

"Recently an Assistant Examiner of Accounts made an audit of the books and records of the State Teachers College, Livingston, Alabama, and charged back to Mr. N. F. Greenhill, President, the sum of $177.70, account of their having paid this amount to a Public Accountant for making an audit of the records in 1937. I am attaching to my letter a copy of a letter from Mr. Greenhill regarding this matter, and, with all available facts before you, I would appreciate a ruling on the following question:

" 'Was the employment and payment of a Certified Accountant for an audit of the books and accounts of State Teachers College, Livingston, Alabama, a legal expenditure on the part of the College?' "

The historical background of your request is pertinent in making a study of your problem.

From conferences with numerous educational officials and from other sources made available to me, it appears that the various educational insti-

tutions of this State some years back at the insistence of the State Board of Education attempted to raise their scholastic standards in the educational field. One of the most important steps in this direction was to secure admission in and approval by the Southern Association of Colleges and Secondary Schools. The approval of this organization was essential for recognition of the educational standards in our institutions of higher learning in this State, the Southern Association being the only educational standardizing agency recognized for this part of the country throughout the United States. Therefore, in order for our higher educational institutions to become standardized it was necessary that they meet the requirements set by this association for membership.

On June 7, 1939, the State Board of Education at its meeting in Montgomery, Alabama, adopted the following resolution:

> "On motion of Mr. Lee, seconded by Mr. Ellis authority was given these institutions (state teachers colleges) to apply for membership in the Southern Association of Colleges, such adjustments as are not inconsistent with the functions of these institutions, which will make them eligible for membership in this association were allowed."

This resolution, therefore, authorized the institutions concerned therewith to apply for membership and to make the necessary adjustments in their curriculum etc. in order for them to become eligible for membership in the Southern Association. It was obviously not only to urge but to authorize these institutions to do all possible in order to perfect their membership.

In pursuance thereof, the State Teachers College of Livingston, Alabama, made a study of the standards of the Southern Association and year after year attempted to better their curricula, material and personnel in order to meet these standards. Finally in 1937 formal application for membership was made to the Southern Association by the State Teachers College at Livingston. This application was quite extensive and comprehensive, being made on forms supplied by the association for institutions desiring membership. Among the necessary documents was an audit of the accounts of the institution, applying for membership attested to and completed by a certified public accountant. This was necessary in order that Standards 6, 7 and 8 of the Constitution and Standards of the Southern Association might be complied with.

In order for the State Teachers College at Livingston to comply with the direction of the State Department of Education in applying for membership and making adjustments necessary to complete its eligibility, it was necessary that an audit be made by a certified public accountant on the form sent out by the Southern Association.

It is my opinion, therefore, that the officials of the State Teachers College at Livingston were acting upon the express authority of the State Board of Education in hiring a certified public accountant to make an audit of the books and accounts of the institution in order to make application for membership into the Southern Association. There does not appear to my mind to be any violation of the agency delegated by the above-cited resolution in securing the services of this auditor, but it affirmatively appears to my mind that it was an act coming directly within the purview of the agency established by the said resolution.

Therefore, it is my opinion that the State Teachers College at Livingston did have the authority to pay the sum of $177.70 to the certified public accountant for making an audit of the books in compliance with requirements set out by the Southern Association of Colleges and Secondary Schools necessary for application for membership therein.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 14, 1939.

Hon. William H. Ivey,
Chief, Division of Labor,
Department of Industrial Relations,
Capitol.

Workman's Compensation Act—

Duties of the Superintendent of Insurance relative to the approval of Workmen's Compensation insurance, rates, premiums, schedules, etc. as provided by Section 7584 of the 1923 Code of Alabama were not transferred to the Department of Industrial Relations by the passage of Act No. 161, H. B. 51, approved March 14, 1939 (General Acts, 1939.)

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion under date of July 5, 1939, which follows:

"Kindly refer to Section 9 of the Industrial Relations Act and advise as soon as possible whether in your opinion said section in addition to transferring to this department ex-officio duties of the Superintendent of Insurance as Workmen's Compensation Commissioner same also transferred to this department the duties of the Superintendent of Insurance connected with the approval of workmen's compensation rates, schedules, etc. as outlined in Section 7584 of the 1923 Code."

In my opinion your question should be answered in the negative.

Section 30 of Act No. 245, S. 53, approved August 23, 1919, General Acts 1919, p. 206, provides in part as follows:

"30. Employer given right to insure risks; conditions.—Every employer who accepts the provisions of this act relative to the payment of compensation may at his option insure and keep insured his liability

thereunder in some insurance corporation, association, organization or insurance association or corporation or association formed of employers and workmen or formed by a group of employers to insure the risks under page 2 of this act operating by the mutual assessment or other plans or otherwise, provided, such insurance association, organization or corporation shall have first had its contract and plan of business approved in writing by the commissioner of insurance of Alabama and have been authorized by said insurance commissioner to transact the business of workman's compensation insurance in this State and under such charter or plan. * * * The insurer must be one authorized by law to conduct such business in the State of Alabama, and authority is hereby granted to all insurance companies writing such insurance to include in their policies, in addition to the requirements now provided by law, the additional requirements, terms and conditions in this section provided. Every insurance corporation, mutual corporation, reciprocal exchange or association authorized to transact the business of workmen's compensation insurance in this State and which insures employers against liability for compensation under the provisions of this act shall file with the insurance commissioner its classification of risks and premiums relating thereto and any subsequent proposed classification of risks and premiums, together with the basic rates and merit rating schedules, if a system of schedule-rating or merit rating be used by such insurance corporation, exchange or association, none of which shall take effect until the insurance commissioner shall have approved the same as reasonable, adequate and not excessive. * * * The insurance commissioner may withdraw his approval of any premium rate or schedule made by any such insurance corporation, association, mutual corporation or reciprocal exchange if in his judgment such premium rate or schedule is excessive or unreasonable or discriminatory or is inadequate to provide the necessary reserves. * * * But it shall be lawful for the employer and the workman to agree to carry the risks covered by part 2 of this act in conjunction with other and greater risks and providing other and greater benefits such as additional compensation, accident, sickness or old age insurance or benefits, and the fact that such plan involves a contribution by the workman shall not prevent its validity if such plan has been approved in writing by the commissioner of insurance of Alabama. * * *"

This section of Act No. 245, supra, was brought forward in the 1923 Code of Alabama as Section 7584.

Sections 33a and 34 of Act No. 245, provide as follows:

"33a. For the purpose of gathering statistics and performing the duties hereinafterwards required there is hereby created an office known and designated as the compensation commissioner of the State of Alabama. The director of the department of archives and history of the State of Alabama shall be ex-officio the compensation commissioner of the State of Alabama.

"34. The compensation commissioner of the State of Alabama shall prepare and cause to be printed, at the expense of the State and to be paid for as other supplies are paid for, and upon request furnish free of charge to any employee or employer such blank forms and literature as he shall deem requisite to facilitate or promote the efficient administration of this act other than the papers relating to court proceedings, which as set forth in the section 33 are to be prepared by the chief justice of the Supreme Court of Alabama."

These sections were brought forward in the 1923 Code as Sections 7589 and 7590.

Section 8 of Act No. 464, S. 243, approved October 1, 1923, General Acts 1923, p. 607 (Now Section 8329 of the 1923 Code of Alabama) provides as follows:

> "8329. Superintendent of insurance is compensation commissioner.—The superintendent of insurance shall be compensation commissioner ex officio and shall possess and have all the powers and authority, and perform all the duties now conferred on the director of the department of archives and history as ex officio compensation commissioner of the State of Alabama."

Section 9 of Act No. 161, H. B. 51, approved March 14, 1939 (General Acts 1939), provides as follows:

> "Section 9. Abolition of the Office of Compensation Commissioner and Transfer of his Functions and Duties to the Department of Industrial Relations. The office of Compensation Commissioner is hereby abolished and all of the functions and duties of the Compensation Commissioner (and of the Superintendent of Insurance as Ex-officio Compensation Commissioner and of the Director of the Department of Archives and History as ex-officio Compensation Commissioner) are hereby transferred to and conferred upon the Department of Industrial Relations."

Before the passage of Act No. 161, supra, the Superintendent of Insurance was acting in a dual capacity in regard to the Workmen's Compensation Act. He was required, as Superintendent of Insurance, to approve the schedules, rates, premiums, etc. of the Insurance companies writing Workmen's Compensation insurance for the employers and as the Compensation Commissioner he had to compile certain statistics and receive reports of settlements under the Act.

By the passage of Act No. 161, supra, the Superintendent of Insurance was relieved of his duties as Compensation Commissioner, but he still has to perform, as Superintendent of Insurance, certain enumerated duties relative to the Workmen's Compensation Act.

The premises considered, it is therefore my opinion that the duties of the Superintendent of Insurance, relative to the approval of Workmen's Compensation insurance, rates, premiums, schedules, etc. as provided by Sections 7584 of the 1923 Code of Alabama were not transferred to the Department of Industrial Relations by the passage of Act No. 161, H. B. 51, approved March 14, 1939 (General Acts of 1939).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 15, 1939.

Hon. A. H. Howard,
Tax Collector,
Macon County,
Tuskegee, Alabama.

Tuskegee Self-Help Corporation—property of deeded to State—

1937-38 taxes on property deeded to the State by the Tuskegee Self-Help Corporation in April, 1938, which cannot be collected from the Tuskegee Self-Help Corporation, are a moral obligation of the State.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 10, 1939, in which you request my opinion as follows:

"I hold a Tax Receipt in my office against Tuskegee Self-Help Corp. to the amount of $464.095 as of January 1st, 1939, for 1938 year.

"It is my understanding that this property has been deeded to the State of Alabama. Won't you please advise me at once as to how I must proceed as to the collection of this tax since it now belongs to the State."

You state in your letter of May 23rd that the property in question, formerly owned by the Tuskegee Self-Help Corporation, was assessed on February 21, 1938, presumably for the tax year beginning October 1, 1937. Therefore, when the property was conveyed to the State on April 15, 1938, there was a tax lien on the property.

The taxes should rightfully be paid by the Tuskegee Self-Help Corporation, (Quarterly Report of Attorney General, Vol. VII, page 237) but since there are no assets of said corporation, you must try to collect the taxes from some other source. Since the State acquired this land subject to the existing tax lien, the State is under a moral obligation to pay the taxes.

There is apparently no legal remedy, however, by which the State can be made to pay the taxes. You may ask the State Comptroller for credit for said unpaid taxes, and, if this request is refused, you may make application to the State Board of Adjustment, as provided in Acts of 1935, page 1164, amended by Acts of 1936-37, page 205.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 15, 1939.

Hon. D. L. Rosenau, Jr.,
Judge, Municipal Court,
Limestone County,
Athens, Alabama.

Sheriff's fees—seizure fees—Sheriff entitled to seizure fee of $3.00 provided by Section 4768, Code of Alabama, 1923, as amended by General Acts 1935, page 727, only when such seizure is made following issuance of a search warrant and an arrest is made.

1. Sheriff is entitled to ten cents per mile in the execution of search warrant and writ of arrest as provided for in General Acts 1935, page 727.

2. Sheriff held not entitled to $1.00 on executing search warrant when said sheriff collects $3.00 seizure fee in contraband liquor cases.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of May 22, 1939, in which you request my opinion as follows:

"Two opinions rendered by Mr. Carmichael as attorney general during his term of office regarding seizure fees in prohibition cases have me puzzled and confused, and our sheriff, county solicitor and I have tried to figure out what is really meant, but to no avail.

"Suppose a man is arrested and tried in this court on a charge of illegal possession of whiskey, in other words, under Section 4621 of the Code of 1923. Sometimes such a defendant is arrested after the sheriff executes a search warrant, and sometimes not. What seizure fee, if any, should be allowed?

"The bound volume of the attorney general's biennial report for 1934-6 holds that the seizure fees are determined by Section 4654 of the Code of 1923, and that under such section no seizure fee is to be charged when the amount seized is less than one gallon (1934-6 Biennial Report, pages 344-5).

"On the other hand, the quarterly report of the attorney general for April, May and June, 1936, on pages 60 and 61 holds that the sheriff is entitled to a flat seizure fee of $3.00 whether the amount seized is one pint or fifty gallons. This opinion was not included in the bound volume for the same period named above, so I do not know whether it was withdrawn or not, but it was rendered at a later date than the opinion referred to above.

"This second opinion in the quarterly report apparently tries to make some distinction between the two sections of the code under which seizure fees are regulated (Sections 4654 and 4768 of the Code of 1923), stating

that the latter section refers to a seizure made under a search warrant where the proceeding is **in rem,** whereas Section 4654 refers where the proceeding is **in personam.** Of course, where a man is arrested charged with possessing whiskey and is found guilty and fined or sentenced to imprisonment, it is a proceeding against the defendant, a proceeding **in personam.** I hardly see how you could have a proceeding **in rem** in such a case. Of course, where an automobile transporting liquor is sought to be condemned, it is a proceeding **in rem,** and it looks as though Section 4763 refers to some type of condemnation proceeding **in rem** against the liquor and containers, if any, but I have never heard of any such in this county,—the man is simply charged with illegal possession, and that ends the matter, no one is going to claim the whiskey seized.

"I wish to allow the sheriff whatever legal fees he is entitled to for seizures, with or without search warrant, where the defendant is tried for illegal possession, but naturally also do not wish to impose illegal charges against the defendants,—in other words, I don't want the state examiners to find that I have failed to charge legal fees due the sheriff or that I have collected illegal fees from the defendants, and you are the man who can settle this to our complete satisfaction. Kindly give me a ruling.

"Also kindly advise proper amount that sheriff is entitled to for executing liquor search warrant. For executing the ordinary search warrant, the sheriff is entitled to $1.00 in the day time, and $2.00 at night. What is the correct amount for liquor search warrants, if there is any difference?

"Also is the sheriff entitled to ten cents a mile each way in whiskey cases, where the defendant is charged with illegal possession of whiskey, whether the liquor was seized under a search warrant or not."

Answering your request, we deem it necessary to precede our direct answer by a reconciliation of the two opinions to which you refer in your request. There appears to have been quite some confusion as a result of the rendition of these two opinions.

The first of these was an opinion to Hon. J. M. Gauntt under date of October 18, 1935, found in Biennial Report of Attorney General, 1934-36, p. 34. From this opinion permit me to quote the last two paragraphs:

"You will note this section says, among other things, 'if a seizure is made of not less than one gallon nor more than five gallons of such liquor, the fee shall be $3.00'; **therefore, I find no fee provided for the seizure of liquor in less quantity than one gallon.**

"Answering your second inquiry, I know of no allowance for mileage for transporting liquors seized **except where the liquor is seized under search warrant.** Biennial Report, 1926-28, p. 282." (Emphasis supplied)

It is seen that this opinion deals entirely with Section 4654 of the Code of Alabama, 1923, which reads as follows:

"4654. Fees to be taxed for arrest and seizures in prohibition cases.—When an officer arrests any person in possession of an unlawful quantity

or quantities of prohibited liquors, or of such liquors under conditions prohibited by law, then on the conviction of such party of a violation of a city ordinance or state law, whether in the recorder's court, or state court possessing jurisdiction, a fee for making the seizure of the liquors shall be taxed up against the defendant, and paid to such officer as a part of the cost of the case as follows: If a seizure is made of not less than one gallon, nor more than five gallons of such liquors, the fee shall be three dollars; if the seizure be of more than five gallons, and less than twenty gallons, the fee shall be five dollars and if more than twenty gallons be seized, the fee shall be ten dollars."

In other words, where officers are making seizures without search warrants (**Tranum v. Stringer,** 216 Ala. 522, 113 So. 541) the above quoted section, as construed in the Gauntt opinion, is controlling.

Subsequently this office rendered an opinion to R. L. Holcomb under date of April 17, 1936, found in Quarterly Report of Attorney General, Vol. III, p. 59. This opinion dealt with fees due officers when making seizures **under a search warrant.** I quote as follows from this opinion:

"I call your attention to the following from Section 4768 of the Code of Alabama, 1923, which provides for an allowance for officers making a seizure of liquors **under a search warrant:** 'There shall be allowed the officer making the seizure under a search warrant **the sum,** allowed by Section 4704, **of** $3.00 * * *.'"

In this opinion it was pointed out that "Section 4654 has no connection with Section 4768. They are entirely separate. Each has a distinct field of operation." It appears that the syllabus of the opinion to the Clerk of the Circuit Court of Tallapoosa County, supra, is somewhat misleading in that it states as a general rule the fact that "no seizure fee is provided for the seizure of liquors where the amount seized is less than one gallon." Technically speaking, this statement is incorrect but when the body of the opinion is read in conjunction with this headnote, we quickly note the distinction between this opinion and that addressed to Sheriff Holcomb, supra. Your attention is directed to the question asked by Mr. Gauntt. It is as follows:

"What amount of seizure fee is allowed to the sheriff when less than one gallon of whiskey is captured?"

The question was not asked as to the amount of fee to be received where the whiskey was taken **under a search warrant.** This was the matter specifically dealt with in the Holcomb opinion. The writer of the Gauntt opinion on the other hand deals entirely with the fees allowed the sheriff where the seizure is **under Section 4654** as may be seen by the fact that this Section is quoted at length.

Again, there appears the statement that "I find no fee provided for the seizure of liquors in less quantity than one gallon." Your attention is directed in this connection to the sentence just preceding the quoted statement. I believe that an examination of that sentence will reveal that the writer was still talking of a seizure under Section 4654 and **not one made with a search warrant under Section 4768.** I repeat that the Holcomb opinion concerns Section 4768 and not Section 4654, as it was stated in that opinion that:

"Section 4654 has no connection with Section 4768. * * * Each has a distinct field of operation."

Permit me to further call your attention to the last paragraph of the Gauntt opinion which clears up all doubt that the writer had anything other than Section 4654 in mind when writing the opinion. This paragraph is as follows (you will note the reference to seizure under search warrant cited as an exception):

"Answering your second inquiry, I know of no allowances for mileage for transporting liquor seized except where the liquor is seized under search warrant. Biennial Report, 1926-28, p. 282."

I regard to your comment concerning the nature of the proceedings in such cases, upon which our later opinion was predicated, permit me to state what the Supreme Court said in the case of **Holcomb v. Stone**, 229 Ala. 88, 155 So. 63:

"Article 11 of chapter 167 of the Code of 1923 (section 4740 et seq.) provides for forfeiture and destruction of contraband liquor and other property and may be designated as a **penal statute in rem.** In aid of the enforcement of section 4740, section 4741 provides for the issuance of search warrants; section 4742 names the officer who may issue such warrants; sections 4743 and 4747 provide a form and contents; section 4744 designates the officer by whom the search warrant must be executed. Following in minute detail are provisions for the seizure, trial, and disposition of such contraband liquors or property as may be found and brought into court under the search warrant. Section 4768 makes an allowance of $3 to the officer making the seizure under the warrant. The above is set out to show that a proceeding for the seizure and confiscation of contraband liquors and property is entirely separate and apart from the body of the criminal law in force and effect at the time of the enactment of section 3741, Code 1923, relating to search warrants in criminal cases.

"While the law providing for the seizure and destruction of contraband liquors and property partakes of the criminal law, it also involves the rights of property and to that extent partakes of the civil law as well. **It is a penal proceeding in rem,** carries its own provisions for enforcement, and provides fees for officers executing process under it. The petitioner was entitled to the $3 in each of the cases in which he executed search warrants under and by virtue of section 4768. **He is not entitled to the fee of $1 in each of such cases under section 3741 of the Code of 1923."** (Emphasis supplied)

The above-quoted part of the opinion rendered in the above styled case also answers your inquiry in regard to the fees to which an officer is entitled where the seizure is made under Section 4768 of the Code of 1923.

Section 4768 has been amended by the General Acts of 1935 at page 727 as follows:

"Section 1. That Section 4768 of the Code of Alabama be amended so as to read as follows: '4768. ALLOWANCE FOR OFFICERS ATTENDING AND PROSECUTING CONDEMNATION PROCEEDINGS; HOW

TAXED AND PAID.—There shall be allowed the officer making the seizure under a search warrant the sum of three dollars and also the sum of two dollars additional for every day that such officer shall necessarily be employed in attending court for the purpose of causing liquors seized to be condemned, and the sum of ten cents per mile for each mile he shall travel in executing the writ, together with such reasonable sum as the court may deem just for necessary expenses incurred in transporting and providing storage for liquors and vessels seized provided, however, that where a warrant is issued to any peace officer acting under the laws of the State of Alabama to search a designated place for prohibited liquors and beverages, and such officer executes such warrant and seizes such liquors or beverages, but fails to arrest any person or persons for having such prohibited liquors or beverages in his or their possession, then no fees, mileage or allowances shall be paid to any one for any service under this article; * * *"

It will be noted that since the passage of this act, it is necessary that an arrest be made before there is a fee given to the officer for the seizure as mileage or allowances allowed. **Quarterly Report of Attorney General, Vol. XIV,** p. 35. This opinion will answer your third question.

To briefly review the holding of this opinion, permit me to point out that it is my opinion that where an officer is making a seizure without a warrant he is entitled to the fees which are set out in Code Section 4654. However, when the officer is making a seizure under a search warrant, he is entitled to the seizure fee, mileage and an allowance for necessary expenses, if he complies with the subsequent provisions of this act, i. e., makes an arrest, which amended Section 4768 of the Code of 1923. Furthermore, as we have pointed out (see **Holcomb v. Stone,** supra), when the officer has been paid the seizure fee in accordance with this provision, he is not then entitled to the regular $1.00 in day time and $2.00 at night for executing ordinary search warrants.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 17, 1939.

Hon. D. L. Rosenau, Jr., Judge,
Municipal Court, Limestone County,
Athens, Alabama.

Solicitor's Fees—Limestone County—

(1) A solicitor's fee should be taxed as a part of the costs in a case tried in the Municipal Court of Limestone County when a conviction has been obtained and a fine or penalty imposed for the violation of the game and fish laws or the rules and regulations promulgated thereunder.

(2) A solicitor's fee, collected as part of the costs in a case tried in the Municipal Court of Limestone County, when a conviction has

been obtained and a fine or penalty imposed for the violation of the game and fish laws or the rules and regulations promulgated thereunder, should be paid into the County Treasury to the credit of the "Municipal Court Fund."

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of May 15, 1939, in which you request my opinion as follows:

"Kindly give me a ruling on whether a solicitor's fee should be charged for conviction in this court for violations of the game and fish laws.

"Under Section 51 of the Game and Fish Laws, I see that a $5.00 solicitor's fee should be charged in courts having J. P. Jurisdiction or similar jurisdiction, but under the act creating this court (Local Acts of 1931, page 167 et seq.) it is specifically provided that no solicitor's fee shall be charged in any case where a justice of the peace has final jurisdiction, and acting under this law I have never taxed or collected as costs solicitor's fees in criminal cases where justices of the peace have final jurisdiction, such as public drunkenness, game and fish violations, certain cases of assaults and petit larceny, etc.

"The general laws, of course, do not affect a court created by special act unless specifically provided in the general act, so consequently any general act providing for solicitor's fee would not apply in this special statutory court unless the general law made it apply expressly. This principle is too well established to require citation, as is also the principle that a justice of the peace has final and not merely preliminary jurisdiction in game and fish violation cases.

"I find one case in this county where a court having J. P. jurisdiction has paid the solicitor's fees in such cases direct to the solicitor. Even if such fees were chargeable in this court, would they go to the solicitor, or would they go into the Municipal Court Fund as provided with cases where solicitor's fees can be charged, in the act creating this court.

"I feel that I have followed this act exactly in not collecting or charging solicitor's fees in game and fish cases, but would like your ruling in order to be protected."

Your attention is first directed to Section 48 of Act No. 240, General Acts of Alabama, 1935, page 643, which gives justices of the peace and the inferior criminal courts of the Counties of the State final jurisdiction in any case involving a violation of any of the provisions of the game and fish laws, or the rules and regulations promulgated thereunder. It is further provided in Section 51 of said Act, supra, that a solicitor's fee, in addition to other costs, shall be taxed when a conviction for the violation of any of the provisions of the game and fish laws, or the rules and regulations promulgated thereunder has been obtained and a fine or penalty imposed in a justice of the peace court or a court of similar jurisdiction. Section 51, supra, is as follows:

"Section 51. The solicitor of any county, or deputy solicitor of any county, in which any violation of the provisions of the game and fish laws or the rules and regulations provided thereunder, shall have occurred, shall appear on behalf of the State and prosecute the offender. When a conviction has been obtained and a fine or penalty imposed in the court of a justice of the peace or a court of similar jurisdiction, there shall be attached, in addition to other costs, a fee of five ($5.00) dollars as solicitor's fee."

This now brings us to a consideration of Act No. 362, Local Acts of Alabama, 1931, page 167, which created the Municipal Court of Limestone County, Alabama. Section 2 of said Act, supra, provides in part that "said court and the judge thereof shall have and exercise all the jurisdiction, power and authority, and shall perform all of the duties which are now or may hereafter be conferred or required by the general laws of the State of Alabama, on justices of the peace and justices courts." It, therefore follows, under the express authority of section 84 of Act No. 240, supra, that the Municipal Court of Limestone County has final jurisdiction in cases involving violations of any provisions of the game and fish laws, or the rules and regulations promulgated thereunder. However, the last clause of Section 4 of the act creating the Municipal Court of Limestone County, supra, provides as follows:

"* * * except that in no criminal case where the charge is such as justices of the peace have final jurisdiction of under the general laws of the State, shall any solicitor's fee be taxed as costs upon a conviction of the defendant."

A similar provision is contained in Section 14 of said act, supra.

The question now arises whether Section 51 of Act No. 240, General Acts of Alabama, 1935, page 643, has the effect of superseding the last clause of Section 4 and the similar provision in Section 14 of the act creating the Municipal Court of Limestone County, supra, so as to require a solicitor's fee, as provided for in Section 51, supra, to be taxed as a part of the costs in a case tried in said court involving a violation of the game and fish laws or rules and regulations promulgated thereunder.

We answer this question in the affirmative. In our judgment it was the intention of the Legislature that Section 51, supra, should apply in all cases where a conviction has been obtained and a fine or penalty imposed for a violation of the game and fish laws or rules and regulations promulgated thereunder, regardless of the justice of the peace court or court of similar jurisdiction in which said conviction is had. To hold that Section 51, supra, was not applicable to all justice of the peace courts or courts of similar jurisdiction having jurisdiction of game and fish violations in all counties of the state would have the effect of striking down said section as violative of Section 96 of the Constitution which provides that "the legislature shall not enact any law not applicable to all the counties in the State, regulating costs and charges of courts, or fees, commissions or allowances of public officers." See **Barnes, Court Clerk v. State ex rel. Tate,** 26 Ala. App. 450, 162 So. 404, cer. denied 230 Ala. 596, 162 So. 406. It, therefore, follows and we so advise you that a solicitor's fee as provided for in Section 51, supra, should be taxed as a part of the costs in a case tried in the Municipal Court of Limestone County when a conviction has been obtained and a fine or penalty imposed for the violation of the game and fish laws or the rules and regulations promulgated thereunder.

In answer to your second inquiry, I beg to advise that solicitor's fees collected as a part of the costs in the Municipal Court of Limestone County when a conviction has been obtained and a fine or penalty imposed for the violation of the game and fish laws or the rules and regulations promulgated thereunder should be paid into the County Treasury to the credit of the "Municipal Court Fund" as provided in Sections 11 and 14 of the Act creating said court.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 18, 1939.

Hon. Harry E. Smith,
Sheriff, Jefferson County,
Birmingham, Alabama.

Sheriffs—Execution, levy and sale — Alabama Beverage Control Act—

Legally purchased whiskey levied on under execution issued upon valid judgment must be sold in accordance with the directions of the Alabama Alcoholic Beverage Control Board.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of May 19, 1939, in which you request my opinion as follows:

"I wish to ask your opinion as to the duty of the Sheriff under the following statement of facts.

"Landlord recovers judgment against tenant, and has execution issued and delivered to the Sheriff, instructing him to levy upon the stock of goods of the defendant, consisting of restaurant fixtures, cigars, tobacco and several cases of whiskey in half pints properly stamped with State license tax.

"In compliance with the above instructions of the plaintiff, the Sheriff levies upon the personal property of the defendant, consisting among other things of five cases of whiskey, assorted brands, in half pints.

"The Sheriff advertises the said property in a newspaper published in the County, to be sold after ten days on a given date at the premises described during the legal hours of sale, to the highest bidder for cash.'

"The Alabama Alcoholic Beverage Control Act provides that retailers must purchase their supplies from licensed wholesalers through the State of Alabama.

"1st. Please advise whether or not it is against the law for the Sheriff to advertise such liquors for sale, and sell same to the highest bidder for cash?

"2nd. Please advise whether or not it would be a violation of the law for a private individual to purchase at the Sheriff's sale such whiskey?

"3rd. Please advise whether or not the Sheriff is required to sell such liquors which he has levied upon to the State of Alabama, without competitive bids?"

These intoxicating liquors, under our presently applicable statutes (the Alabama Beverage Control Act) are property, and are subject to levy and sale. The general rule on this subject is stated in 23 C. J. 332, Section 55, as follows:

"Upon the ground that intoxicating liquors are property, and that they are not within any enumerated exception or exemption, it has been held that they are subject to levy and sale under execution on the same basis as any other property notwithstanding the existence of statutes regulating or prohibiting the sale of intoxicating liquors, execution sales not being deemed within the prohibition of such statutes."

In the annotation, the case of **State v. Johnson,** 33 N. H. 441, is cited in support of the above statement. In the opinion in that case, the court spoke as follows:

"The general provision of the statutes makes the property of a debtor to be taken in mesne process and in execution for his debts, with certain enumerated exceptions. We cannot think that the law relating to the sale of spirituous liquors was intended to have the effect of protecting that species of property in the hands of the owner against the right of the creditor to take it for his debt. If taken in mesne process or execution, such property must be held and disposed of according to law, like other property . . . . The officer is ordered by his precept to take the property of the debtor; the liquors are his property; they are not exempted by any positive law, nor, we think, by any implication from the law relating to the sale of spirituous liquors; and the officer would be warranted by his writ in taking them, and in selling them fairly on execution, to satisfy the debt, under the general provision of the law on that subject."

As stated by Mr. Justice Gardner for the Supreme Court in the case of **State ex rel Wilkinson v. Murphy,** 186 So. 487, in which case the constitutional validity of the Alabama Beverage Control Act was upheld:

"The argument against the constitutionality of this Act fails to take due account of this distinction, universally recognized, as disclosed by the following succinct statement of the law as found in 15 R. C. L. page 255: 'The matter of regulating and restraining the liquor traffic, being refer-

able to the police power—a power that has resided in the states since the beginning of the present system of government, and was not surrendered to the federal government—it is held that the entire business of manufacturing and selling liquor is completely within the control of the state, and is said so to exist as a correlative of the state's duty to support paupers, to protect the community from crime, and to confine and maintain the criminal, since the liquor traffic is one source of pauperism and crime. By virtue of this power the state may regulate the mode and manner and the circumstances under which this traffic may be conducted, and may surround the right to pursue it with such conditions, restrictions and limitations as the legislature may deem proper, or it may prohibit it entirely. This is now a matter of universal recognition based on a long line of decisions both federal and state.'* * *

"No one has any inherent right to engage in the liquor traffic. * * *"

In the exercise of its undoubted right so to do the Legislature in the said Alabama Beverage Control Act provided for the regulation of the liquor traffic in the State of Alabama.

Subsection (c) of Section 3 of said Act reads as follows:

"(c) Except as herein otherwise expressly provided, the purpose of this Act is to prohibit transaction in liquor and alcohol, and malt or brewed beverages, which take place wholly within the State, except by and under the control of the Board, as herein specifically provided, and every section and provision of this Act shall be construed accordingly. The provisions of this Act, through the instrumentality of the Board, and otherwise, provide the means by which such control shall be made effective. This Act shall not be construed as forbidding, affecting or regulating any transaction which is not subject to the legislative authority of this State."

Section 6 thereof provides in pertinent part:

"Section 6. The functions, duties and powers of the Board shall be as follows:

"(a) To buy, manufacture and sell alcoholic beverages and to have alcoholic beverages in its possession for sale, as defined and enumerated herein.

"(b) To control the possession, sale, transportation and delivery of alcoholic beverages as enumerated and defined herein."

Subsection (a) of Section 7 of said Act reads:

"(a) The Board may from time to time make such regulations not inconsistent with this Act as it shall deem necessary for carrying out the provisions of this Act, and from time to time alter, repeal or amend such regulations, or any of them."

Thus, it can be clearly seen that the Legislature has vested the Alabama Alcoholic Beverage Control Board with authority to control the liquor traffic in the State of Alabama.

Consequently, it is my opinion that when you have levied upon the personal property of a tenant, under an execution issued on a valid judgment recovered against him by the landlord and included in the personal property upon which you have levied is whiskey legally purchased and possessed by him, i. e., purchased and possessed in accordance with the provisions of the Alabama Beverage Control Act, you should apply to the Alabama Alcoholic Beverage Control Board for instructions or directions as to the method or manner in which you must proceed to sell said whiskey, instead of proceeding to sell the same in the manner provided in Article 4 of Chapter 291 of the Code of Alabama, 1923, and that the Board should advise you by a regulation promulgated under the authority vested in it by Subsection (a) of Section 7, supra, as to how to proceed with the sale of the same and that you should then proceed in accordance with the instructions or directions received from it.

The situation with which we are now confronted is analogous to the situation dealt with in the case of **Hart v. Seacoast Credit Corp.**, a New Jersey case, 169 Atl. 648, decree affirmed 174 Atl. 525. In the State of New Jersey, franchises to operate busses were subject to levy and sale under execution. A creditor of a corporation holding such a franchise secured a judgment against the corporation and execution issued thereon and the franchise was levied upon and sold by the sheriff. One of the questions before the court was whether or not such sale had to have the approval of the utility commissioners, the statute in that state providing that any transfer of such franchises had to be approved by the utility commissioners. Speaking to this question, the court said:

> "While a sale by one on execution is not strictly a sale by the owner of the franchises, it has the same effect so far as concerns the public, and should be conditioned by like limitations. * * * In order to be effective, execution sales must also be approved."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1939.

Hon. J. F. Smith,
Clerk of Circuit Court,
Escambia County,
Brewton, Alabama.

Voters—Registration—

Wife held to be entitled to register in county of legal residence of her husband when she has performed no acts or expressed any intention to establish legal residence in another county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 5, 1939, in which you request my opinion as follows:

"I will thank you for your opinion on the following: John Doe, a resident citizen of Brewton, Escambia County, Alabama, who has registered and qualified to vote by paying all necessary poll taxes due by him to this date, moves to Birmingham, Alabama. Here he is claiming employment at the present, and wishes to register his wife in Brewton, Escambia County, Alabama; said wife having been born and raised in Brewton, Escambia County, maintaining her home here with her husband, but having also moved with him to Birmingham and having been out of Escambia County with her said husband for a period of some four years. In view of the fact that the husband still maintains his voting in Brewton, Alabama, would his wife be entitled to register and vote in Brewton, Escambia County, Alabama?"

In reply I wish to advise that the answer to your request must necessarily turn upon the question of residence, since I assume that Mrs. Doe is over twenty-one years of age. You state that Mrs. Doe was born and raised in Escambia County; that she made Escambia County her residence until her husband secured employment in Birmingham. I assume that Mrs. Doe is not registered in Jefferson County, or in any other county. It is evident that Mr. Doe has elected to retain his legal residence in Escambia County, but because of employment removed himself and family to Jefferson County with the evident intention of returning to Escambia County at a future date. He has thus fixed and retained the family residence in Escambia County.

I wish to refer you to an opinion of this office, reported in Quarterly Report of the Attorney General's opinions, Vol. II, page 76, in which the following quotation concerning the wife of a State employee required by law to live in Montgomery is found:

"Mr. Doe, being a State Officer, must necessarily reside in Montgomery if his duties are at the Capitol. It will be conceded on all hands that one of the few rights left to the husband in Alabama is that of fixing the residence for the family and it is too well known to require citation of authority, that a wife who refuses to accompany the husband to a selected residence must be guilty of abandonment. Mrs. Doe has no alternative.

"The law further provides that such temporary absence from the selected domicile does not forfeit citizenship or legal residence therein. Section 366 of the Code of 1923 provides as follows:

" 'Residence not acquired or lost by temporary absence.—No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence or by being absent from his or her place of residence in the civil or military service of the state, or the United States, neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state.'

"I am, therefore, of the opinion that Mrs. Doe could acquire legal residence in Sumter County as set out above and her temporary residence in Montgomery would not forfeit the acquired residence in Sumter County."

It is my judgment that the Mrs. Doe considered in your request, while not the wife of a state officer, is in the same position as the Mrs. Doe considered in the above quotation and is governed by the same principles and rules of law referred to above.

It is, therefore, my opinion that the Mrs. Doe here considered has never lost her legal residence in Escambia County; that her intention of remaining a citizen of Escambia County is evidenced by her acts; and that she is entitled to register in Escambia County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1939.

Hon. Vance Cleveland,
Tax Collector,
Bibb County,
Centreville, Alabama.

(1) Commissioners' Courts or Boards of Revenue, or other like governing bodies may purchase office supplies for county offices without advertising for same.

(2) Commissioners Courts, Boards of Revenue or other like governing bodies may purchase supplies for the officers of the county under Act No. 112, H. B. 72, approved March 7, 1939, known as the "Department of Finance Act of 1939."

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 30, 1939, in which you request my opinion as follows:

"Please advise whether or not County Officials are required to receive bids on purchases of Printing and other supplies, when the amount of the purchase is under $100.

"I am under the impression that we are not required to receive bids on purchases under $100."

Under the general law, I find no provision requiring a county to advertise for bids when purchasing printed matter, or other office supplies regardless of the amount paid for same. I call your attention to Section 9604 of the Code of Alabama of 1928 (Michie's) which is as follows:

"9604. Stationery of officers paid for by county.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

This section is plain in its provisions and gives ample authority to the court of county commissioners of your county to supply your county offices with necessary supplies. Biennial Report of Attorney General, 1936-38, page 181.

At this point it might be well for me to suggest that if the county so desires it might purchase its supplies under Act No. 112, H. B. 72, approved March 7, 1939, known as the "Department of Finance Act of 1939."

I am presuming that you have no local law covering this matter, as in your request you make no mention of such an act.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 18, 1939.

Hon. Chas. E. McCall,
State Treasurer,
Capitol.

Department of Commerce—

All appropriations and funds accruing to the various bureaus, boards and departments which now constitute and compose the Department of Commerce can be consolidated into one fund and be used to pay the salaries and defray the expenses of the Department of Commerce.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated June 15, 1939, which is as follows:

"I am submitting to you herewith a letter from the State Comptroller in which is indicated his intention to consolidate the appropriations made by law to the various divisions or bureaus of the Department of Commerce.

"Your attention is invited to Chapter 27, Code of Alabama, 1923, Volume 1, page 758 et seq., and to General Acts Alabama, 1935, pp. 3 and 4, and to page 556, General Acts Alabama, 1935, Schedules 160.19-160.21.

"Your attention is also invited to General Acts Alabama, Extra Session 1932, page 47, section 24.

"I also call your attention to Acts passed by the present Legislature, Governor's No. 14, H. 35-Allen, and Governor's No. 170, H. 308-Thomas, copies of which Acts I am herewith submitting.

"Please advise whether the consolidation of the funds, belonging by law to the bureaus constituting the Department of Commerce, into one fund for the operation of the Department of Commerce is authorized by law.

"I call your special attention to the fund provided by law for the maintenance of the office of Fire Marshal, and request that you advise whether or not this fund can be consolidated with the other funds belonging to other bureaus of the Department of Commerce for the general support and maintenance of the Department of Commerce, or whether such fund must be devoted exclusively to the support of the Fire Marshal Department, and the surplus of said fund, at the time required by law, 'be covered into the general fund of the State Treasury.'"

You request our opinion on the following question:

"Please advise whether the consolidation of the funds, belonging by law to the bureaus constituting the Department of Commerce, into one fund for the operation of the Department of Commerce is authorized by law?"

In order to properly answer the question we deem it necessary to first consider and review the act creating the Department of Commerce. This department was created by Act No. 14, H. B. 35, approved February 9, 1939, which act was amended by Act No. 170 H. B. 308, approved March 17, 1939. Said act as amended, supra, provides in Section 1 thereof as follows:

"Section I. There is hereby created a Department of Commerce for the State of Alabama with subordinate bureaus and divisions as hereinafter provided."

Section II of said Act as amended, supra, makes the following provision:

"Section II. The Department of Commerce shall consist of a Bureau of Banking, a Bureau of Insurance and a Bureau of Building and Loan."

Not in Code

It is then provided in Sections VII, VIII and IX of said Act as amended, supra, as follows:

"Section VII. All powers, authority, duties and functions now by law vested in, conferred upon or required to be exercised by the Banking Department of the State of Alabama, the Banking Board of the State

of Alabama, and the Superintendent of Banks are hereby transferred to, vested in and conferred upon the Bureau of Banking of the Department of Commerce as herein created."

"Section VIII. All powers, authority, duties and functions now by law vested in, conferred upon or required to be exercised by the Bureau of Insurance, the Superintendent of Insurance and the Fire Marshal Ex-Officio are hereby transferred to, vested in and conferred upon the Bureau of Insurance of the Department of Commerce as herein created."

"Section IX. All powers, authority, duties and functions now by law vested in, conferred upon or required to be exercised by the Building and Loan Department of the State, the Building and Loan Board and the Building and Loan Commissioner are hereby transferred to, vested in and conferred upon the Bureau of Building and Loan of the Department of Commerce as herein created."

From a review of the above quoted sections of said act as amended, supra, it will be observed that the Banking Department, the Bureau of Insurance and the Building and Loan Department no longer independently exist as distinct agencies, bureaus or departments of the State of Alabama but are now a part of the Department of Commerce.

This now brings us to a consideration of the question propounded in your inquiry. That is, whether all of the appropriations and funds accruing to the various boards, bureaus and departments which now constitute and compose the Department of Commerce can be consolidated into one fund for the operation of said department. In asking this question you first refer us to Chapter 27, Code of Alabama, 1923, Vol. I, page 758 et seq. and to the General Acts of Alabama 1935, pp. 3 and 4 and to page 556, Schedule 160.19-160-21. A review of Chapter 27 Code of Alabama, 1923, Volume 1, page 758, et seq. reveals that it deals with the office of State Fire Marshal, and prescribes the duties, powers, authority and functions of said office. Act No. 4, H. B. 38, General Acts of Alabama, 1935, pp. 3 and 4 amends Section 952 of Chapter 27 of the Code of 1923, supra, so as to provide for the consolidation and coordination of the office of State Fire Marshal with the office of the Bureau of Insurance and transfers all the powers, duties and authority of said State Fire Marshal to the Superintendent of Insurance as State Fire Marshal Ex-officio. Schedule 160.19, 160.20 and 160.21 of Revenue Act, 1935, General Acts of Alabama, 1935, page 556, to which you refer are as follows:

"Schedule 160.19. For the purpose of maintaining the office of State Fire Marshal and paying the expenses incident thereto, every fire insurance company and other insurance companies writing fire insurance on automotive vehicles, whether upon the stock or mutual plan, and all individuals, firms, corporations, associations, or aggregations of underwriters, doing fire insurance business in the State of Alabama shall pay to the Superintendent of insurance on or before the first day of March annually, in addition to the taxes now required by law to be paid by such companies, associations, partnerships, firms or individuals, two-fifths of one per cent of the gross premium receipts, less return premiums of all such companies, firms, individuals, associations or partnerships on all business done in the State of Alabama during the year preceding, to be included in their annual statement under oath to the bureau of insurance for the fiscal year ending December 31st, in case such company, association, firm, partnership, or aggregation of underwriters is now re-

quired by law to make such annual report, or does make such annual report."

"Schedule 160.20. Every such company, firm, partnership, association, body of individuals acting as underwriters, or insuring each other, no matter how or under what form the business of fire insurance is done, shall annually report to the Superintendent of Insurance the gross premiums received for the year, or portion of the year preceding, and shall, on or before the first day of March of each year pay to the Superintendent of Insurance two-fifths of one per cent of such gross premium receipts, less return premiums, or such amount as may be assessed, not exceeding two-fifths of one per cent of such gross premium receipts, less return premiums, as hereinafter provided."

"Schedule 160.21. The Superintendent of Insurance shall certify the money so received into the State Treasury as a special fund for the maintenance of said office of State Fire Marshal, and the expenses incident thereto. Any portion of the said fund remaining unexpended on January 1st next after the end of any fiscal year shall be covered into the General Fund of the State Treasury."

Section 24 of the "Budget and Financial Control Act," General Acts of Alabama, Extra Session 1932, page 47, is as follows:

"Section 24.—APPROPRIATIONS WRONGFULLY EXPENDED: It shall be unlawful for any trustee, commissioner, director, manager, building committee, or other officer or person connected with any department, institution, bureau, board, commission or other State agency, to which an appropriation is made, to expend any appropriation for any purpose other than that for which the money was appropriated, budgeted and allotted, or to consent thereto. If the Governor shall ascertain that any department, institution, bureau, board, commission or other State agency has used any of the moneys appropriated to it for any purpose other than that for which the money was appropriated, budgeted and allotted and not in strict accordance with the terms of this Act, the Governor shall have the power and he is hereby authorized to suspend all appropriations and allotments to such department, institution, bureau, board, commission or other State agency until and after such amounts diverted or wrongfully expended have been replaced."

In our judgment a consideration of the foregoing laws to which you direct our attention present two questions bearing upon the inquiry propounded by you. **First,** we find that the Superintendent of Insurance is required to certify the money which he receives as Ex-officio Fire Marshal into the State Treasury as a special fund for the maintenance of the office of State Fire Marshal and the expenses incident thereto. Further that any portion of said special fund remaining unexpended on January 1st next after the end of any fiscal year shall be covered into the General Fund of the State Treasury. Under the request of the Department of Commerce to consolidate the appropriations and funds accruing to the various boards, bureaus and departments which now constitute and make up said department it would be necessary to combine the Fire Marshal Fund with others and thus relieve it of being a special fund. **Second,** that it is unlawful for any trustee, commissioner, director, manager, building committee, or other office or person connected with any department, institution, bureau, board, commission or other State agency, to which an appropriation is made to expend any appropriation for

any purpose other than that for which the money was appropriated, budgeted and allotted or to consent thereto. Considering the request of the Department of Commerce to consolidate the various funds in the light of the second question presented, we find that in fact and truth a consolidation of the funds as requested will amount to a violation of this provision of law, supra, unless the act creating the Department of Commerce, as amended, supra, supersedes or takes said act as amended without the provisions of said law.

The question now arises whether or not the provisions of law heretofore cited and as analized in this opinion, would have the effect of prohibiting a consolidation of the appropriations and funds as requested by the Department of Commerce. We think not. In arriving at this conclusion, attention is first directed to Section XI of the Act as amended, supra, whereby the Department of Commerce was created. Said Section is as follows:

> "Section XI. All books, records, accounts, documents, papers, furniture, fixtures, supplies, material, equipment and other personal property and all lands, buildings and other real property possessed or used by, and all appropriations made for, any department, board, bureau, commission, agency or office of the State, the functions and duties of which are transferred to and conferred upon the Department of Commerce by this Act, are hereby transferred and assigned to the Department of Commerce and shall be delivered to or otherwise made available to the Director of Commerce upon his request."

Attention is further called to Section XII of said Act, as amended, which is as follows:

> "Section XII. The Director of the Department of Commerce shall, with the approval of the Governor, determine the number of employees needed for the efficient and economical performance of the functions and duties of the Department of Commerce. All employments heretofore existing in any department, board, bureau, commission, agency or office of the State, the functions and duties of which are transferred to and conferred upon the Department of Commerce by this Act, the right to appoint or nominate employees thereto and all appropriations for the payment of such employees, are hereby transferred and assigned to the Department of Commerce. The Director of Commerce shall, however, have the right to discharge any such employee, if, in his discretion, he shall conclude that the services of such employee are not needed or that the efficiency of the Department will be increased by the replacement of such employee. Employees determined to be needed and not transferred from some other department, board, bureau, commission, agency or office of the State, and employees to replace any employees so transferred, shall be appointed by the Director of Commerce."

It will be noted from a careful examination of the above quoted sections, supra, that the personal property possessed by and all appropriations made to any department, board, bureau, commission, agency or office of the State, the functions and duties of which were transferred and assigned to the Department of Commerce, and subject to be delivered to or otherwise made available to the Director of Commerce upon his request. It will further be noted that all appropriations for the payment of employees whose employment in any department, board, bureau, commission, agency or office of the State, the employments of which were transferred to said department, are by Section XII, supra, transferred and assigned to the Department of Commerce. In 59 C. J. page 238, Section 382 we find the following statement:

"The legislative power is supreme in matters relating to appropriations as to which no constitutional restrictions exist. Constitutional provisions requiring the existence of appropriations made by law secure to the legislature this exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government, and are conservative, not restrictive or prohibitory of the legislative power over the public revenue."

As above noted the power of the legislature is supreme in matters relating to appropriations. The only check on this power of the legislature is the constitution and in this particular matter we find no inhibitions in the constitution of Alabama. Not only is the legislature supreme in matters relating to appropriations, but has the same powers to reappropriate funds of the State. In **State ex rel Sceffler et al v. Griswold, Director of Public Welfare et al,** 35 Ohio App. 354, 172 N. E. 438, the following principle of law was laid down:

"The power of the Legislature to reappropriate is as broad as it is to appropriate originally."

We find that in the matter before us that appropriations had been made by the legislature to various bureaus, boards, and departments which bureaus, boards and departments were by the act as amended, creating the Department of Commerce, relieved of their individuality and made a part of said department. The legislature as heretofore noted made provision for the appropriations previously made to these various bureaus, boards, and departments to be transferred and assigned to the Department of Commerce and made available to the Director of Commerce upon his request. This amounted to a reappropriation of these funds. As above noted the power of the legislature to appropriate and reappropriate funds are supreme and this therefore brings us to the final question involved. That is, whether it was the intention of the legislature that all the appropriations and funds accruing to the various bureaus, boards and departments which now constitute and make up the Department of Commerce should be consolidated into one fund which would be used to pay the salaries and defray the expenses of the Department of Commerce. If this was their intention, it is our opinion that under the authorities heretofore cited as to the power of the legislature over appropriations, that the provisions of the act, as amended, creating the Department of Commerce, supersedes all other laws, thus making such a consolidation permissible. As a guide in determining this question we first refer to the case of **Abramson et al vs. Hard, Comptroller, et al.** 155 So. 590, 229 Ala. 2 where the court made the following statement:

"In interpreting and construing statutes, primary rule is to ascertain and give effect to Legislature's intention."

Also to **Williams v. State,** 179 So. 915, cert. denied 179 So. 920, 235 Ala. 520 where it was said:

"The intent of the lawmaker is the law."

And further to the case of **Railroad Comm. of Alabama v. Ala. Great Sou. R. R. Co. et al,** 64 So. 13, 185 Ala. 354, where we find the following statement.

"A remedial statute is entitled to receive an enlightened and liberal construction."

In our opinion, after a careful examination and study of the various provisions of the act, as amended, creating the Department of Commerce, which appear in this opinion together with a consideration of the act as a whole, it was the intention of the legislature that these appropriations and funds accruing to the various bureaus, boards and departments should be consolidated into one fund for the purpose of carrying on the Department of Commerce. This act, as amended, was in our judgment passed for the purpose of economy with the view in mind that an elimination of the various independent departments with their independent heads would produce the desired result. Certainly the legislature could not have intended that the various bureaus, boards, and departments should be consolidated and yet allow the appropriations previously made and the funds subsequently accruing to them be handled as though they still existed independently and not as a part of the Department of Commerce. With the intention of the legislature in mind and giving the act, as amended, a liberal construction because it amounts to a remedial statute armed to remedy a situation which bordered on extravagance of public funds, we are of the opinion that your inquiry should be answered in the affirmative. You are therefore advised that a consolidation of the appropriations and funds accruing to the various bureaus, boards and departments now constituting the Department of Commerce may be lawfully made.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 18, 1939.

Hon. Sam W. Oliver;
County Solicitor,
Tallapoosa County,
Dadeville, Alabama.

Lotteries—

Suit club is a lottery.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of June 21, 1939, in which you request my opinion as follows:

"Retail Merchants of Alexander City are making complaint against one of their number engaged in operating 'Suit Clubs.' I have hesitated about having a warrant of arrest issued until I had the benefit of your opinion as to whether or not the operation of the 'Suit Club' constitutes a violation of Section 4247 of the Code.

"It appears that each club is composed of forty members who pay $1.00 each over a period of twenty-six weeks. A drawing is held regularly

each week and the member whose name is drawn receives merchandise valued at $25.00. Each member must pay $1.00 each week for the full twenty-six weeks or until his name is drawn. Members whose names are not drawn receive $25.00 in merchandise after the expiration of twenty-six weeks and the payment of $26.00.

"I hesitate to advise the Sheriff to execute warrants of arrest without the benefit and protection of your opinion."

It is my opinion that the scheme as set out in your inquiry constitutes a lottery under the laws of the State of Alabama. Section 4247 of the 1923 Code of Alabama provides as follows:

"Section 4247. Carrying on or representing lottery; selling tickets in same.—Any person who sets up, carries on, or is concerned in setting up or carrying on any lottery or device of like kind, or any gilt enterprises, or any scheme in the nature of a lottery or gift enterprise or who sells or disposes of any lottery or gift enterprise ticket, or ticket in any scheme in the nature of a lottery or gift enterprise; or who shall receive money or take an order for any lottery or gift enterprise ticket, or any ticket in any scheme in the nature of a lottery or gift enterprise; or who is interested or concerned in selling or disposing of any ticket in any lottery or gift enterprise, or scheme in the nature of a lottery or gift enterprise; or who shall act for or represent any other person in selling or disposing of any such ticket, must, on the first conviction, be fined not less than twenty-five nor more than five hundred dollars; and, on the second conviction, must be fined not less than fifty nor more than five hundred dollars, and must also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than ninety days; and on the third or any subsequent conviction, must be fined not less than one hundred nor more than one thousand dollars, and must also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than six nor more than twelve months."

It will be noted that the above-quoted section does not attempt to define lottery, and so relies on the common law definition of the same.

It has been repeatedly held that a scheme to be a lottery must consist of three elements: (1) a prize, (2) awarded by chance, (3) for a consideration. **Grimes vs. State,** 235 Ala. 192, 178 So. 73.

The presence of the first two elements in this scheme is without dispute. The first suit is won on the payment of $1.00, the next suit for $2.00, etc. This is certainly the winning of a prize by chance.

Now to come to the question as to whether there is a consideration within the spirit and purpose of our lottery laws. It appears to me that the payment of $26.00 for $25.00 worth of merchandise by those not previously winning is a sufficient consideration for the chance to win one of the suits for a less amount than the market value of same. However, pretermitting this, it is my opinion that the increase in business brought about by such a scheme would be sufficient consideration, as the participant is enticed into the scheme by the hope of winning a $25.00 suit for a smaller amount of money. Thus, "The hazarding of money with the hope of obtaining by chance a larger sum" is of the essence of the scheme. **Grimes vs. State,** supra.

The Supreme Court of North Carolina in an opinion dealing with a scheme whereby the player is assured of an ordinary return for his money and in addition the chance of securing a prize, said:

> "43. State v. Lowe, 178 N. C. 770, 101 S. E. 385. (a) Reason for rule.—This factor makes 'the general scheme more attractive and alluring. The difference between it and a single wager on the cast of a die is only one of degree. They are both intended to attract the player to the game, and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing, and in order to protect the unwary against the insidious wiles of the fakir or the deceitful practices of the nimble trickster. Call the business what you may, a 'gift sale,' 'advertising scheme,' or what not, it is none the less a lottery, and we cannot permit the promoter to evade the penalties of the law by so transparent a device as a mere change in style from those which have been judicially condemned, if the gambling element is there, however, deep it may be covered with fair words or deceitful promises. If it differs from ordinary lotteries, it is chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is, therefore, more thoroughly dishonest and injurious to society. So far as those who manage schemes of this character can be supposed to give the credulous persons who deal with them any chance whatever of a return in greater value for their investment, the chance lies in the purchase of the right to participate in the favor offered or held out to tempt the gambling instinct, and thereby to prosper the business of the unlawful concern." 38 Corpus Juris 299.

The Supreme Court of North Carolina also said in an opinion dealing with a suit club similar to the one in question:

> "In our case the prospect of securing nothing is wanting, but this makes the scheme the more enticing. A definition which also has been generally accepted and which fits the facts disclosed in the record is this: 'A sort of gaming contract, by which, for a valuable consideration, one may by favor of the lot obtain something in return of a value superior to the amount or value of that which he risks.' U. S. v. Olney, 1 Abb. 275, Fed. Cas. No. 15,918; Bishop on Stat. Crimes (2d Ed.) Section 952, and note 2. In Hull v. Ruggles, 56 N. Y. 424, the court adopts the following as the result of the approved definitions: '"Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." This definition is approved in Wilkinson v. Gill, 74 N. Y. 63, 30 Am. Rep. 264, as the popular meaning of the word, and the one proper to be adopted with a view of remedying the mischief intended to be prevented by the statutes prohibiting lotteries; and it is said: "Every lottery has the characteristics of a wager or bet, although every bet is not a lottery."' Yellow-Stone Kit v. State, 88 Ala. 199, 7 South. 338, 7 L. R. A. 599, 16 Am. St. Rep. 38. See, also, Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171; State v. Mumford, 73 Mo. 647, 39 Am. Rep. 532; Meyer v. State, 112 Ga. 20, 37 S. E. 96, 51 L. R. A. 496, 81 Am. St. Rep. 17; McLain's Cr. Law, Sec. 1315; 25 Cyc. 1633; 5 Words and Phrases, p. 4245. In Reg. v. Harris, 10 Cox's Cr. Cases, 352, it is said not to be material whether the full value of the shilling, which it appeared in that case was paid by the subscribers, was or was not received by them, as in either event the scheme would come within the mischief of the acts

prohibiting lotteries, inasmuch as they were induced to part with their money in the hope of obtaining, not only their alleged shilling's worth, but something of much greater value, the right to which was to be decided by chance. It will be seen by examination of the authorities that chance is an essential element of a lottery, whether that chance be as to any return or merely as to the amount or value of the return, and, as thus considered, where there is a hazard in which sums are ventured upon the chance of obtaining a greater value, the scheme partakes of the nature of a lottery; that is, something gained or won by lot." State v. Perry, 154 N. C. 616, 70 S. E. 387.

The Supreme Court of Georgia in **DeFlorin vs. State,** 1201 Ga. 593, 49 S. E. 699, said:

"A 'suit club' whose members pay to a tailor $1.00 per week and which holds weekly drawings as a result of which the member holding the lucky number receives from the tailor a suit of clothes, and then ceases to be a member of the club, is a scheme in the nature of a lottery. This is so although an unlucky member, who continues to pay his $1.00 weekly for thirty weeks is entitled to a $30.00 suit of clothes regardless of the result of the drawings."

Lotteries, Section 22, 38 Corpus Juris 299, provides as follows:

"Section 22. Clubs for Disposing of Suits or Other Goods. As embracing the essential elements of a lottery within the definition above given, so-called clubs wherein the members pay periodical dues and conduct periodical drawings for a specified article of merchandise are lotteries, even though the unsuccessful members are entitled to receive the article eventually, after the payment of a stipulated amount, or to withdraw and take out in trade the installments which they have paid, and although the winners are not determined by law but are selected by the seller."

Therefore, it is my opinion that a suit club as set out and described in your inquiry is a lottery or a scheme in the nature of a lottery, in violation of Section 4247 of the Code of Alabama 1923.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 20, 1939.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Probate Judge of a county who is also president of an incorporated bank, which buys bonds, warrants, or claims from said coun-

ty, is not pecuniarily interested in said transaction so as to violate Section 5016 or Section 5024, as amended by Act No. 193, General and Local Acts of Alabama, Extra Session, 1936-37, page 225, of the Code of Alabama, 1923, or any other provision of the law.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of June 19, 1939, requesting my official opinion as follows:

"Please advise if there is any violation of Section 5016 and 5024 or any other section of the 1923 Code of Alabama for a bank to buy county bonds, warrants or claims from brokers, dealers or otherwise, where the probate judge of said county is the president of the bank buying such paper."

Assuming that the bank in question is a corporation, we answer your inquiry in the negative. We find no objection to a bank buying county bonds, warrants or claims from brokers, dealers or otherwise, where the probate judge of said county is the president of the bank buying such paper. In the case of **Navoo Hardwood Company v. Bass,** 214 Ala. 553, 108 So. 452, it was held:

"A corporation is a distinct entity, to be considered separate and apart from the individuals who compose it."

Applying the above principle of law to the facts presented by your inquiry, we arrive at the conclusion that a probate judge of a county who is also president of an incorporated bank which buys bonds, warrants or claims from said county is not pecuniarily interested in said transaction so as to violate Section 5016 or Section 5024, as amended by Act No. 193, General and Local Acts of Alabama, Extra Session, 1936-37, page 225, of the Code of Alabama, 1923, or any other provision of the law.

See also opinion of this office to Hon. A. B. Jefferies, Member of the Board of Revenue and Road Commissioners, Mobile County, Mobile, Alabama, dated November 7, 1935. (Quarterly Reports of Attorney General, Vol. I, page 165).

However, if the bank in question is not incorporated, but is operated by an individual or individuals, then this opinion would not be applicable.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 20, 1939.

Hon. J. W. Hamilton,
Tax Collector,
Jefferson County,
Birmingham, Alabama.

Taxation—When an assessment of goods is made by the consignee, under Section 36 of the Revenue Acts of 1935, the identity of which is lost, the tax lien does not attach on other goods consigned by consignor in a subsequent year.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 9, 1939, in which you request my opinion as follows:

"For the tax year 1937 Dean and Company, a firm, assessed a stock of merchandise consigned to them by three different manufacturing companies. During the year said Dean and Company went out of business and the merchandise on hand was delivered to Mill and Mine Supply Company.

"As this action was taken about a year ago it is impossible for me to identify the merchandise assessed to Dean and Company for the purpose of levying and selling to enforce the collection of the taxes. However, during the interim, other merchandise has been consigned by the above mentioned manufacturing companies to the Mill and Mine Supply Company.

"I am asking for your opinion as to whether or not I have the legal right to levy upon and sell for taxes the merchandise now under consignment to the Mill and Mine Supply Company to satisfy the account that I have against Dean and Company; or, in other words, does the State's lien lie against consignments of said manufacturing companies subsequent to the retirement of Dean and Co.?"

In answer to your inquiry, it is my opinion that you cannot levy on and sell for taxes the goods now under consignment to the Mill and Mine Supply Company.

Section 36 of the Revenue Act of 1935 provides as follows:

"Section 36. Commission merchants and all persons trading and dealing on commission, assignees and consignees authorized to sell, and persons having in their possession goods, wares or merchandise belonging to another, and subject to taxation in any county, city or town in Alabama, where said property is located, when the owner of the property does not reside in the county are deemed to be owners of the property in their possession for the purpose of assessment and unless such goods, wares or merchandise have been otherwise listed for taxation the same shall be listed separately from any other goods, wares or merchandise owned by such person, firm or corporation for taxation and the name of the

assignor or consignor shall be listed on the return, the same shall be assessed for taxation to the person, firm or corporation who has such goods, wares or merchandise in their possession, and in no case shall the assessment be less than sixty per cent of the fair and reasonable market value of the average amount of goods, wares and merchandise so held during the twelve months next preceding the first day of October when same are due to be assessed for taxation. In assessing such stock of goods, wares or merchandise the Assessor shall require the production of the last inventory taken and attach the same to the tax return list, and if in the judgment of the Assessor such inventory is incorrect, or if such time has elapsed since the inventory was taken that it shall have ceased to be reliable as to the value or amount thereof, he shall have the right to examine the books of the person who has the property in his possession or the property itself or use such other information as he can obtain."

It will be noted that under this section the consignee is deemed the owner for the purpose of assessment. The name of the consignor is listed merely for the purpose of identification.

The assessment is against the consignee, Dean and Company. If the goods in question cannot be identified you must look to the consignee and not the consignor.

I call your attention to the fact that if Dean and Company has any assets whatever, you may levy against these assets, and in this way collect the taxes due from this concern. Quarterly Report of Attorney General, Vol. 14, page 133; Biennial Report of Attorney General, 1934-36, page 461.

Moreover, even assuming the consignor were liable for the tax in question, the lien does not attach on the goods of the consignor acquired the subsequent year. **Yarbrough Brothers Hardware Co. v. Phillips,** 209 Ala. 341, 96 So. 414.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 20, 1939.

Hon. H. B. Hamner, Secretary,
Russell County Board of Education,
Phenix City, Alabama.

Members of Courts of County Commissioners—Contracts with County Board of Education.

1. A member of a Court of County Commissioners may contract with County Board of Education to transport children to and from school.

2. County Boards of Education are not agencies of the county and do not come within the purview of Section 5024 of the Code of 1923, as amended.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated June 30, 1939, which is as follows:

"We have a man who has been under contract with the County Board of Education to furnish a school bus and to drive said bus, in hauling children to school at so much per month. He is also a member of the County Commission. The question has been raised in regard to the legality of his holding both places.

"Please advise the County Board of Education whether the said Board may legally reelect this man to haul school children while he is a member of the County Commission."

My answer to your question is in the affirmative.

Section 5024 of the Code of Alabama, 1923, as amended, General Acts, 1936-37, page 225, provides that members of Courts of County Commissioners may not legally enter into contracts with the county. However, the Supreme Court of Alabama has expressly held, in the case of **State v. Tuscaloosa County,** 233 Ala. 611, 172 So. 892, that the County Board of Education is not a part of the county, but is a quasi corporation, and an independent agent of the State. It, therefore, follows that since the County Board of Education is a State agency, Section 5024 of the Code would have no application in so far as contracts with the County Board of Education are concerned.

I am therefore, of the opinion that the County Board of Education of Russell County may legally enter into a contract with a member of the Court of County Commissioners to transport children to and from school.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 20, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Gambling Devices—Condemnation—

When an action for the condemnation of a slot machine (gambling device) is dismissed by the plaintiff (the State) the machine and its contents should be returned to the owner thereof.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 8, 1939, in which you request my opinion as follows:

"I am attaching hereto copy of Docket Sheet, in a case involving the condemnation of a Slot Machine. The case appears to have been dismissed by the State but no order was made as to disposition of the machine and its contents and same are still in the hands of the Register.

"Taking into consideration the above will you please advise me as follows:

"1. What disposition should be made of a Slot Machine and its contents when the Court enters an order 'Dismissed on Motion of Plaintiff'?"

In answer to your inquiry, it is my opinion that the slot machine and its contents should be returned to the owner thereof.

The condemnation proceedings in question were instituted under the provisions of Act No. 671, H. 423, approved July 25, 1931 (General Acts 1931, p. 806). Section 5 of said Act provides as follows:

"Section 5. DUTY OF SHERIFF TO SEIZE AND REMOVE.—It shall be the duty of the sheriff of any county in which any gambling device may be found to seize the same, remove it from the place where it is found, and keep until disposed of as hereinafter provided in this Act. Within five days after the seizure and removal of any gambling device, the sheriff making the same shall report the seizure and detention to the circuit or other solicitor, or deputy solicitor, or any prosecuting officer within the county where the gambling device was found or seized, giving a full description thereof, the number of the device, if any, the place and firm of manufacture, the person in whose possession it was found, the person making claim to the same, or any interest therein, if the name can be ascertained or is known, and the date of the seizure."

Section 6 of said Act provides for the institution of proceedings by the solicitor. Section 7 of said Act provides as follows:

"Section 7. DISPOSITION OF CONTENTS OF GAMBLING DEVICE. —It shall be the duty of any sheriff or other officer seizing and removing any gambling device to open the same, in any manner, in the presence of the register of the circuit court, in equity, for the proper county, to take therefrom any money or property found therein, and to turn over and deliver to the said register said money or said property. The register shall safely keep said money and other property found in such gambling device, and if said device is condemned and forfeited as being in violation of the terms of this Act, the court shall direct in its decree that one-half of the money or monies taken therefrom, shall be paid to the officer making the seizure, and the remaining one-half shall be paid into the general fund of the county in which said gambling device was found and seized. Anything else found in said gambling device, such as candies, gums, merchandise, or other personal property, shall be disposed of as the court may in its decree direct."

Section 9 of said Act provides as follows:

"Section 9. DECREE TO DIRECT DESTRUCTION OF GAMBLING DEVICE.—When any decree of condemnation and forfeiture is made in any case filed under the provisions of this Act, the judge or chancellor making such decree shall direct therein the destruction of said gambling device by the sheriff of said county in the presence of the register of the court; and said order or decree, in the event no appeal is taken shall be carried out and executed before the expiration of twenty days from the date of the decree."

It will be noted from the above that in the event the machine is ordered and forfeited specific provision is made for the disposition of the machine and its contents. However, in the event the action is dismissed by the plaintiff (the State) the machine and its contents should be returned to the owner thereof. Such is his property and he is entitled to the possession of same unless it be declared condemned and forfeited.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 20, 1939.

Hon. W. P. Tartt,
Register, Circuit Court,
Sumter County,
Livingston, Alabama.

Interrogatories and answers to same—There is no authority of law authorizing the clerk to record interrogatories and answers.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 21, 1939, in which you request my opinion as follows:

"Where interrogatories are propounded to a material witness, who is out of the court in which case is filed and the answer thereto is of material evidence, are these two papers to be recorded and the charge made of 15c per hundred words?"

I do not know of any authority of law for recording interrogatories and the answers thereto. Interrogatories and the answers to the same are one method of procuring evidence but, like evidence, they are not a part of the record on appeal. Biennial Reports, 1928-30, p. 558.

The law of costs and fees must be strictly construed and are held penal in their nature. I call your attention to Section 7255 of the Code of Alabama, 1923, which is as follows:

"7255. No fee charged unless expressly authorized.—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 21, 1939.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Taxation—Homesteads—

Amounts allowed for homestead exemptions are considered as partial payments by the State out of luxury or sales taxes of the ad valorem taxes due by a taxpayer on the due date thereof to the extent of said exemptions. Final settlements of Tax Collectors are governed by this theory. Commissions of Tax Assessors and Tax Collectors lost by homestead exemptions are presently paid out of Property Tax Relief Fund.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion of June 27, 1939, is as follows:

"Section 21 of an Act approved February 23, 1937, page 138, Acts 1936-37, provides that the loss to the two and a half mill, one mill and three mill fund on account of Homestead Exemptions granted under an Act approved February 20, 1937, page 113, Acts 1936-37, shall, with the approval of the Governor, be replaced out of the proceeds of the sales tax.

"An Act approved February 23, 1937, page 142, creates the 'Property Relief Fund.'

"In making final settlement with the Tax Collectors, the following conditions have arisen, and for your information I am outlining the procedure of a final settlement:

"The first act in making final settlement is to set up the charges as per Assessor's Abstract and second, the credits:

"CHARGES:

Valuation—	2½ Mill	1 Mill	3 Mill
4,000,000.00	10,000.00	4,000.00	12,000.00

CREDITS:

Mileage	1.25	.50	1.50
Assessor's Comm.	50.00	25.00	75.00
Collector's Comm.	50.00	25.00	75.00
Errors — Net	10.00	4.00	12.00
Errors — Homestead	2.50	1.00	3.00
Insolvents	5.00	2.00	6.00
Litigations — Net	10.00	4.00	12.00
Litigations — Homestead	5.00	2.00	6.00
Lands Bid In — Net	25.00	10.00	30.00
Lands Bid In — Homestead	25.00	10.00	30.00
Cash	5,000.00	2,000.00	6,000.00
Homestead Exemptions — Net	4,816.25	1,916.50	5,749.50
Total	10,000.00	4,000.00	12,000.00

"I wish to call your attention to the items 'Errors,' 'Homesteads,' 'Litigation,' 'Homesteads,' 'Lands Bid In,' 'Homesteads.'

"The question has arisen as to whether the sales tax should replace an amount equal to the amount of Homestead Exemptions in taxes in Litigation, Lands Bid In, and the amount reported by the Collector as being allowed the tax payer at time taxes were paid, or just the amount reported by the Collector as being allowed by the Collector to the taxpayer when said taxpayer has paid his taxes.

"For your information I am setting up below the Final Settlement of Homestead Exemptions.

"The Assessor's Abstract shows the following for Homesteads:

	State	Soldier	School
"Per Abstract	4,848.75	1,929.50	5,788.50
Less Errors	2.50	1.00	3.00
	4,846.25	1,928.50	5,785.50

"Loss to the two and a half mill, one mill and three mill fund by reason of Homestead Exemptions.

"Amount reported by the Collector semi-monthly as being allowed to the taxpayer when he paid the taxes:

	State	Soldier	School
	4,816.25	1,916.50	5,749.50
"Bal. Due	30.00	12.00	36.00
Litigation—H. E.	5.00	2.00	6.00
Land Bid In—H. E.	25.00	10.00	30.00
Bal. Due	0.00	.00	.00

"Question 1: Shall the Sales Tax replace the following amounts to the three funds:

State	Soldier	School
4846.25	1928.50	5785.50

which is the amount shown by the Abstract, less Errors, but including Litigations and Lands Bid In?

"Question 2: Shall the Sales Tax only replace the amount reported by the Tax Collector as being allowed the taxpayer at time he paid his taxes, excluding the amount in Litigations and Lands Bid In?

State	Soldier	School
4816.25	1916.50	5749.50

"Question 3: Should the amount of loss to the two and a half mill, one mill and three mill fund on account of Homestead Exemptions reported in Litigation and Lands Bid In, be replaced by the current sales tax at time of final settlement?

"Question 4: If the amount of loss to the three funds on account of Homestead Exemptions reported in Litigation and Lands Bid In, is not replaced at time of final settlement, should not an amount of sales tax equal to the amount of Homestead Exemptions be set up out of current sales tax, to be used to replace the amount of loss to the three funds reported in Litigations and Lands Bid In, when said taxes in Litigation are paid or 'Lands Bid In' redeemed?

"Question 5: Can one year's (1938-39) sales tax be used to replace loss on Homesteads for another year (1937-38)?

"Question 6: Should not one year's (1938-39) sales tax be used to replace loss on Homesteads for the same year (1938-39)?

"Question 7: If the current sales tax replaces the amount of loss on Homesteads reported in Litigation and Lands Bid In, is not the Collector and Assessor entitled to commissions on same?

"It is my contention that the sales tax should replace the amount of Homestead Exemptions in 'Litigations' and 'Lands Bid In' at the time of final settlement. If this is not done an amount equal to the loss on Homesteads in Litigations or 'Lands Bid In' will have to be set up as a trust fund, or be used when the taxes are paid, or redeemed.

"I contend that one year's taxes cannot be used to pay another year's debt.

"It is my contention that the amount replaced by the sales tax is equivalent to a partial payment of the taxes."

The homestead exemption from all State ad valorem taxes, not exceeding $2,000.00 in assessed value nor one hundred sixty acres in area, was granted by Act No. 107, S. 5, approved February 20, 1937 (General Acts 1936-37, p. 113).

Section 21 of Act No. 126, H. 179, approved February 23, 1937 (General Acts, 1936-37, p. 125) which act levied the so-called "Luxury Tax" provides in pertinent part as follows:

"Section 21. Before division and distribution, the expenses of the administration of this Act and also so much thereof as may be necessary for the replacement in the Public School Fund of the three-mill constitutional levy for schools and in the General Fund of the one-mill levy for Soldiers' Relief and the two and one-half mills for general purposes lost by any exemption of homestead provided by legislation enacted during Special Session 1936-37 of the Legislature of Alabama shall be first charges against the proceeds of said licenses, taxes or receipts levied or collected under this Act. The Comptroller, with the approval of the Governor, is hereby directed to draw his warrants payable out of the total proceeds of said licenses, taxes or receipts levied or collected under this Act as herein provided in such sum as shall be found necessary to take care of and replace the three-mill constitutional school levy, the one-mill Soldiers' Relief levy and the two and one-half mill levy for general purposes of the State ad valorem taxes lost as above set forth. * * * *"

The above was substantially re-enacted as part of Section 35 of Act No. 18, H. 82, approved February 8, 1939, and effective March 1, 1939, which is the present law applicable to tax on sales and which repealed the 1936-37 Act, supra.

Act No. 127, S. 16, approved February 23, 1937 (General Acts 1936-37, p. 142), sets up a Property Tax Relief Fund and provides for its distribution. Sections 4 and 5 of said act provide as follows:

"Section 4. The State Comptroller, with the approval of the Governor, is hereby directed to draw warrants payable out of the Property Tax Relief Fund payable to the State General Fund, the State Soldiers' Relief Fund and the Public School Fund in amounts sufficient to reimburse each of said Funds for revenues lost by the exemption of homesteads, in whole or in part, of State ad valorem taxation.

"Section 5. The State Comptroller shall ascertain the commissions due the Tax Assessors and Tax Collectors of the several counties lost by the exemption of homesteads as otherwise provided, and shall, with the approval of the Governor, draw his warrant payable out of the Property Tax Relief Fund and payable to each Tax Assessor and Tax Collector in each county in the State of Alabama the amount of his commission so ascertained. Provided, however, that in counties in which the Tax Assessors and Tax Collectors are on a salary basis, the State Comptroller shall ascertain the commissions due the Tax Assessors and Tax Collectors of such counties and lost by the exemption of homesteads as otherwise provided and shall, with the approval of the Governor, draw his warrant payable out of the Property Tax Relief Fund and payable to such county the amount of the commission so ascertained as earned by the Tax Assessor and Tax Collector of such county and due such county for its general fund."

It will be observed from the above that the amount of State ad valorem taxes lost by virtue of the homestead exemptions were to be replaced from the so-called "Luxury Tax" under the 1936-37 Act, supra, and the 1939 Sales Tax Act, supra. This was done for the purpose of reimbursing the funds for which the ad valorem taxes were pledged or appropriated for any loss to said funds sustained by virtue of the homestead exemptions. In other words, the State out of the luxury or sales taxes paid the State ad valorem taxes on homesteads, to the extent of the exemption. This was tantamount to

the State saying to the taxpayer that it would allow him a homestead exemption on State ad valorem taxes, but would pay the amount of said exemption itself. **Such, in my opinion, should be considered as a partial payment by the State of the ad valorem taxes due by a taxpayer on the due date thereof to the extent of the homestead exemption.**

The foregoing view is borne out by an opinion of this office rendered to the Tax Collector of Montgomery County on March 26, 1938 (Biennial Report of Attorney General, 1936-38, p. 577) which held that the sale for delinquent taxes is to be made for the taxes remaining unpaid after deducting the homestead exemption, and that credit for homestead exemptions should be given before the list of unpaid taxes is delivered to the Judge of Probate. Said opinion stated that the Tax Collector has only to collect the taxes shown in the assessment book and a sale for delinquent taxes is only for those set forth in the assessment book, wherein the deduction for homestead exemptions has already been allowed.

As regards the commissions of the Tax Assessors and Tax Collectors lost by virtue of the homestead exemptions, same are payable out of the Property Relief Fund under Acts 1936-37, p. 142, supra. See Biennial Report of Attorney General, 1936-38, p. 395.

Bearing in mind the principle above enunciated that the amount of homestead exemption allowed is considered as a partial payment by the State out of the luxury or sales taxes of the ad valorem taxes due by the taxpayer on the due date thereof, to the extent of the homestead exemption, it follows that in cases of "Payments," "Litigations" and "Lands Bid In" the amount of homestead exemption should be treated as paid and only the net balance should be considered in connection therewith. Therefore, the amount of loss on account of the homestead exemptions reported in "Payments," "Litigations" and "Lands Bid In," should be replaced by the current sales tax at the time of final settlement.

The premises considered, it follows that your first and third inquiries should be answered in the affirmative and your second inquiry in the negative.

The above renders it unnecessary to answer your fourth, fifth and sixth inquiries.

Your seventh inquiry should be answered in the affirmative. The commissions of the Tax Assessors and Tax Collectors lost by virtue of the homestead exemptions are replaced by the Property Relief Fund under Acts 1936-37, p. 142, supra. Same are paid out of the current year's sales tax on the theory, above enunciated, that the amount of the homestead exemptions allowed is considered as a partial payment by the State of the taxes due by the taxpayer on the due date thereof. It is not necessary to wait until final disposition of cases of "Litigations" and "Lands Bid In" to pay these commissions.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 21, 1939.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Plumbing and heating contractor who does plumbing and steam fitting in carrying out contract awarded him is subject to both contractor's license under Schedule 42 and plumbers and steam fitters license under Schedule 110 of Section 348 of the Revenue Laws of 1935.

Plumbing and heating contractor who subcontracts plumbing and heating work is subject only to contractor's license as provided for in Schedule 42 of Section 348 of the Revenue Laws of 1935. However, third party accepting contract to do plumbing and steam fitting work would be subject to both contractor's license under Schedule 42 of the Revenue Laws of 1935, if the contract exceeds $5,000.00, as well as the license required of plumbers and steam fitters under Schedule 110 of Revenue Laws of 1935.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion of May 9, 1939, which is as follows:

"I respectfully request your opinion on the following question:

"1. Is a contractor who pays a license under Schedule 42 of the Revenue Laws liable for a license under Schedule 110, if he, as such contractor, does plumbing or steam fitting in the completion of the contract accepted?

"2. Is a person who is not a plumber or a steam fitter and who does no general business as such, but who operates as a plumbing and heating contractor, liable for a license under Schedule 110 in addition to the license levied under Schedule 42?

"As an example:

"Mr. Benson of Auburn, Alabama, is a heating and plumbing contractor doing business as such in the various counties of the State; and has obtained a license in this county to cover the maximum amount of contracts accepted. He has been cited in other counties to obtain a license under Schedule 110 as a plumber or steam fitter, in addition to the license procured under Schedule 42.

"Is he subject to both licenses?"

I answer your first inquiry in the affirmative. Schedule 110 of Section 348 of the General Revenue Laws of 1935 is as follows:

"Each person doing business as a plumber, steam fitter, or operator of a tin shop or roofing shop, in towns or cities of fifty thousand inhabitants, or over, twenty-five dollars ($25.00), in cities and towns of ten thousand inhabitants and less than fifty thousand inhabitants, fifteen dollars ($15.00), in cities and towns of less than ten thousand inhabitants, ten dollars ($10.00); in all other places, whether incorporated or not, five dollars ($5.00)."

This office in an opinion to Hon. William W. Hill, Judge of Probate, Montgomery County, Alabama, dated August 17, 1937, reported in Biennial Reports of Attorney General 1936-38, page 326, held that a "tin shop and roofing shop operator also accepting orders or contracts for work on or in a building requiring use of paint, tin, lead, etc. required to secure both tin shop license, under Schedule 110, and contractor's license, under Schedule 42 of Section 348 of Revenue Act of 1935." We observed in that opinion that "The Legislature has seen fit to specifically disclose its intention by express words to impose both the contractor's license and the tin shop license on a party operating as detailed in your letter by the provision found in Section 357 of the 1935 Revenue Laws found on page 447 of Simon's Code, which reads as follows:

'Section 357. Wherever in this Act two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the Legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor'."

It will be noted that the opinion to Hon. William W. Hill, supra, was based upon facts where a tin shop and roofing shop operator had secured a license to operate as such under Schedule 110 of Section 348 Revenue Act of 1935, but because he also accepted contracts for doing work on or in buildings or structures requiring the use of paint, tin, lead, etc., he was further subject to a license as a contractor as provided for in Schedule 42 of Section 348 of the 1935 Revenue Laws. Under the facts detailed in your letter we find that the party has secured a contractor's license as provided for in Schedule 42, supra, and contends that he is therefore not subject to a license as a plumber or steam fitter as provided for in Schedule 110, supra, although he does plumbing or steam fitting work in connection with the contract accepted. This is the converse of the facts presented in the opinion to Hon. William W. Hill, supra, and it is our judgment that the holding and reasoning in said opinion would be applicable to the facts herein presented. We therefore advise you that under the facts presented in your first inquiry that the party would be subject to a license under Schedules 42 and 110 of Section 348 of the Revenue Laws of 1935.

I am unable to give a definite answer to your second inquiry as I am not presented with sufficient facts. Several questions arise under your inquiry as framed, i. e., does the party in question who operates as a plumbing and heating contractor do plumbing and steam fitting work in carrying out a contract when awarded to him or does he sub-contract the plumbing and heating work to a third party. If he does plumbing and steam fitting work in carrying out a contract awarded him then we have the same question as presented by your first inquiry and is answered by this opinion. If, however, he subcontracts the plumbing work to a third party he would not be subject to a license under Schedule 110 of Section 348 of the Revenue Act of 1935. The third party accepting the contract to do the actual plumbing or steam

fitting work would, however, be subject to a license under Schedule 42 of Section 348 of the Revenue Laws of 1935, if the contract exceeds $5,000.00, as well as the license required of plumbers and steam fitters under Schedule 110, supra, (See Biennial Report of Attorney General 1936-1938, page 738.)

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 21, 1939.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
Montgomery, Alabama.

1. Expenses of administration of Act No. 146, approved March 17, 1939, may not be paid out of sum appropriated by the said act for the specific purpose of matching Federal funds for indemnifying owners of cattle slaughtered because of tuberculosis, para-tuberculosis, or Bang's disease.

2. Such expenses should be paid from funds of department charged with administering the act, that is, the Department of Agriculture and Industries, through its subordinate, the State Veterinarian.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 17, 1939, in which you request my opinion as follows:

"The Bang's Disease Act Number 146 of the present Legislature appropriates $75,000 per annum for four years, $40,000 which comes from the General Fund and $35,000 from the Agricultural Fund. No specific provision is made in the Act for paying the expenses of administrating the same. The Comptroller's Office has requested this Department to make out the warrants and to mail them to the parties involved. This will place the burden upon this Department of paying the postage, printing the necessary blanks, and providing a record book, to say nothing of the extra clerical work which may be involved.

"I desire your opinion as to whether this necessary expense of administration may be paid out of the sum appropriated by this Act or whether this Department, under the arrangements already in effect, must bear the expenses incident thereto."

It is my opinion that the expenses of administering the act in question (Act No. 146, approved March 17, 1939) cannot be paid from the sum apropriated.

Section 1 of the act provides:

> "Section 1. That the sum of seventy-five thousand dollars ($75,000) annually for a period of four years or so much thereof as may be necessary, be and the same is hereby appropriated, to match Federal funds for the purpose of indemnifying owners of cattle which have been condemned and slaughtered, after having reacted to the test for tuberculosis, para-tuberculosis or Bang's disease as prescribed by the U. S. Bureau of Animal Industry rules and regulations, under the provisions of the Federal-State cooperation programs for combating, or eradicating these diseases. Forty thousand dollars ($40,000) of said sum shall be paid out of the general fund in the State treasury, and thirty-five thousand dollars ($35,000) of said sum shall be paid out of the Agricultural Fund in the State treasury upon requisition signed by the State Veterinarian, to which shall be attached a certified copy of the appraisal of the cattle condemned and slaughtered, and the State Veterinarian's certificate that the condemned cattle have been slaughtered."

It is clearly stated in unambiguous language that the appropriation is "for the purpose of indemnifying owners of cattle which have been condemned and slaughtered." The wording is too clear to permit the use of the money for any purpose other than indemnification. Where the language of a statute is clear and unambiguous, there is no room for construction. **City of Birmingham v. Southern Express Co.**, 164 Ala. 529 51 So. 159.

It is, therefore, my opinion that the expenses of administration may not be paid out of the sum appropriated.

It is further my opinion that the expenses of administration of this act should be paid out of the funds of the department charged with the duty of administering the same, that is, the Department of Agriculture and Industries through its subordinate, the State Veterinarian.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 21, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

State Board of Education—

Funds donated for the treatment of crippled children.—Under the provisions of Act No. 398, General Acts 1935, page 870, all funds

donated to the State Board of Education for the treatment of crippled and disabled children must be paid into the State Treasury and expended under the provisions of said Act.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion of June 20, 1939, which is as follows:

"Please refer to House Bill No. 829 page 870, General Acts of 1935, and advise me in answer to the following question:

"Should not the State Superintendent of Education deposit with the State Treasurer all donations, gifts and bequests received by the State Board of Education, under the provisions of the above Act?

"It is recognized by the writer that expenditures are to be regulated by rules of the State Board of Education and on approval of the State Superintendent. However, from the wording of Section 3 of the Act, it appears to me that all such funds should be deposited in an ear-marked or special fund and shown upon the books and records of the State Comptroller, and that all disbursements should be made on warrants drawn by the Comptroller."

Act No. 398, General Acts 1935, page 870, reads in pertinent part as follows:

"Section 2. That this Act together with funds made available through that section or those sections of the Federal Social Security Act which relates to crippled children, together with any and all available State and Federal appropriations, shall be administered by the State Board of Education, through the Rehabilitation Service of the Division of Vocational Education, and shall be used in the further development of the State's program of physical restoration of crippled children. **That the State Board of Education is hereby authorized to accept donations, gifts and bequests and to expend same on approval of the State Superintendent of Education, executive officer of the Board, for purposes approved under regulations of the State Board of Education.**

"Section 3. That all funds made available for carrying out the provisions of this Act shall be paid by the State Treasurer on warrants drawn therefor by the State Comptroller, on requisition of the State Superintendent of Education. All laws and parts of laws in conflict with this Act be and the same are hereby repealed." (Emphasis Supplied)

It will be noted from the underscored portion of Section 2 of the Act above quoted, that the State Board of Education is authorized to accept donations, gifts and bequests for the purposes set up in said Act, and that such funds shall be expended under the supervision of the Superintendent of Education, for the purposes provided for and set out in said Act.

Section 3 of the Act under consideration provides that all funds made available for carrying out the provisions of the Act shall be paid by the State Treasurer on requisition of the State Superintendent of Education.

Therefore, I am of the opinion that, since the State Board of Education is authorized under the provisions of Section 2 of the above quoted Act to accept donations for the treatment of crippled and disabled children, funds so donated are made available for carrying out the provisions of said Act, and come within the provisions of Section 3 thereof.

It, therefore, follows that funds so donated must be deposited in the State Treasury, and placed in a special or ear-marked fund to be later expended under the provisions of said Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 21, 1939.

Hon. Allen Stewart, Sheriff,
Autauga County,
Prattville, Alabama.

Game and Fish—

State Game Wardens and Deputy Game Wardens not entitled to fees for making an arrest in game law violation cases when the defendant is sentenced to hard labor to pay the fine and costs.

State Game Wardens and Deputy Game Wardens entitled to witness fees when properly summoned as a witness for the State.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your letter of June 14, 1939, in which you request my opinion as follows:

"Are State Game Wardens or Deputy Game Wardens entitled to arrest fees and witness fees in cases violating the game laws, where the defendant goes to hard labor to pay the fine and costs where the said Game Warden is paid a salary by the State?"

It is my conclusion that salaried State Game Wardens and Deputy Game Wardens are not entitled to fees for making an arrest, but may be allowed witness fees in game law violation cases when the defendant is sentenced to hard labor to pay the fine and costs.

I wish to refer you to Section 56 of Act No. 240, General Acts of Alabama, 1935, page 644, which is in pertinent part as follows:

> "Section 56. When an arrest for a violation of the provisions of the game and fish laws is made by a salaried officer and the defendant is convicted, there shall be taxed, as costs in favor of such officer making the arrest, the same fee as a sheriff in this State is entitled to for similar service and **if collected from the defendant** shall be paid over to such officer and shall be his personal perquisite." **(Emphasis ours).**

You will note that said section 56 of Act No. 240 specifically provides that an arrest fee shall be paid a salaried officer if collected from the defendant. The question then arises, if serving a sentence of hard labor for the satisfaction of costs is equivalent to collecting costs from the defendant. It is my opinion that the two modes of payment are not synonymous. In the case of **Ex Parte Joice and Smith,** 88 Ala. 128, 7 So. 3, the Supreme Court of Alabama, in construing the constitutional validity of statutes enforcing the payment of costs by imprisonment of the defendant, states that "the legislature intended to make the non-payment of costs, imposed in a criminal case, the grounds of an increase of punishment, and it simply augmented to that extent, the punishment imposed as a consequence of the non-payment of the fine and costs." See also **Chambers v. State,** 26 Ala. App. 200, 157 So. 23, cert. den. 229 Ala. 328, 157 So. 230. Therefore, it was obviously the intention of the Legislature to allow such officer an arrest fee only when the defendant paid the costs and not when he was sentenced to hard labor for the non-payment of same.

Section 56 of Act No. 240, supra, allows a fee, and must be strictly construed. I refer you to Section 7255 of the Code of Alabama, 1923 and the following cases:

> "Section 7255. NO FEE CHARGED UNLESS EXPRESSLY AUTHORIZED.—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

> "An officer demanding fees for services rendered must point to some clear and definite provision of the statute which authorizes the demand, and compensation cannot be allowed, unless it is conferred by a strict construction of the language employed in the statute. Statutes giving costs or fees will not be extended beyond their letter." **Herrman v. Mobile County,** 202, Ala. 274, 80 So. 112; **Troup v. Morgan County,** 109 Ala. 162, 19 So. 503.

Since the above quoted Section 56 of Act No. 240 is silent as to the payment of a fee for making an arrest if the defendant is sentenced to hard labor upon non-payment of the costs, it is my conclusion that a salaried Game Warden or Deputy Game Warden cannot receive same.

In answer to your second inquiry, it is my opinion that said officers are entitled to such fees when properly summoned as witnesses.

This office has held innumerable times that sheriffs and deputy sheriffs, when properly summoned, are allowed witness fees in criminal cases just as

any other witness. **Biennial Report of Attorney General, 1936-38, page 443; Biennial Report of Attorney General, 1934-36, page 223; Biennial Report of Attorney General, 1930-32, page 179; Biennial Report of Attorney General, 1920-22, page 449.** This rule is founded on the reasoning that if it is the duty of the officer claiming the witness fee to attend as a witness, as part of his official duty, such officer is not entitled to a witness fee; but, if the officer is not required in his official capacity to be a witness, then when summoned as a witness, he attends as an individual and is entitled to a witness fee.

The principle expressed is applicable also to Game Wardens and Deputy Game Wardens. An exhaustive search fails to reveal any duty imposed upon such officers to attend court as a witness, and, therefore, it is my conclusion that they are entitled to receive compensation for such service when acting in that capacity.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 21, 1939.

Hon. John D. Petree, Director,
Department of Industrial Relations,
Montgomery, Alabama.

Unemployment Compensation Commission—

Expenditures made by Chairman of the Unemployment Compensation Commission from funds collected as interest on delinquent contribution payments, held legally and properly made.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of March 31, 1939, in which you request my opinion as follows:

"I respectfully request your opinion concerning the questions hereinafter propounded, based on the following facts:

"Prior to the passage of House Bill 51 on March 14, 1939, which abolished the Unemployment Compensation Commission of Alabama and created the Department of Industrial Relations, the Unemployment Compensation Act of Alabama was administered by a Commission, composed of a Chairman and two Associate Members.

"Funds for administering the Unemployment Compensation Law were derived solely from two sources, namely grants from the United States

Treasury, and amounts collected as interest on delinquent contribution payments. No part of administrative costs were appropriated or defrayed by the State of Alabama.

"Section 10(a) of the Unemployment Compensation Act of Alabama provides in part as follows:

" 'Duties and Powers of the Commission. It shall be the duty of the Commission to administer this Act; and it shall have power and authority to adopt and enforce all reasonable rules and orders necessary or suitable to that end, and to employ any persons, **make any expenditures,** require any reports, and take any other action (within its means and consistent with the provisions of this act) necessary or suitable to that end.'

"Section 14(a) thereof provides in part as follows:

" 'Collection of Contributions. (a) Interest on Tardy Payments. If any employer fails to make promptly, by the date it becomes due hereunder, any payment required to be made by him under this act, he shall be additionally liable (to the **Unemployment Administration Fund**) for interest on such payment at the rate of one percentum per month from the date such payment became due until paid, pursuant to general Commission rules.'

"Section 16(a) thereof provides in part as follows:

" 'Unemployment Administration Fund (a) Special Fund. There is hereby created the "Unemployment Compensation Administration Fund," to consist of all moneys received by the State or by the Commission for the administration of this act or appropriated by the state for the purposes of this act and actually paid into such fund. This special fund shall be handled by the State Treasurer as other state moneys are handled; but it shall be expended solely for the administration of this act and other purposes herein specified, * * *'

"Title III of the Social Security Act in providing for appropriations to the Unemployment Compensation Commission of Alabama, provided, in Section 302(a) thereof:

" 'The Board (The Social Security Board) shall from time to time certify to the Secretary of the Treasury for payment to each state which has an Unemployment Compensation Law approved by the Board under Title IX, such amounts as the Board determines to be necessary for the proper administration of such law during the fiscal year in which such payment is to be made. The Board's determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State Law and of the cost of proper administration of such law; and (3) such other factors as the Board finds relevant * * *.'

"Section 303(a) of said Title III of the Social Security Act provides as follows:

" 'The Board shall make no certification for payment to any State unless it finds that the law of such State, approved by the Board under Title IX, includes provisions for—

"'(1) Such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be reasonably calculated to insure full payment of unemployment compensation when due; and * * *

"'(6) The making of such reports, in such form and containing such information as the Board may from time to time require, and in conformance with such provisions as the Board may from time to time find necessary to insure the correctness or verification of such reports; and'

"The Social Security Board, in January, 1938, issued to all State Unemployment Compensation Agencies Instructions UC-501. Part A of said Instructions UC-501, paragraph 6(a) provided in part as follows:

"'Prior to certifying a grant, the Social Security Board will approve the State Agency's budget for the quarter concerned, and such adjustment as the Board finds necessary in order to limit the grant to expenses essential to proper administration of the State's Unemployment Compensation Law. The approved budget of the State Agency will be set forth by the Board on Forms ..... in such detail as it deems necessary, and will be transmitted to the State Agency together with Form UC-105, notifying the Agency that a grant has been made. No payment or encumbrance shall be made for any item not authorized on Forms ....., except in such categories set forth on these forms as specified no itemization, nor shall any payment or encumbrance be made in excess of the amount allotted per item; per category, or per office in the approved budget;'

"The above portion of paragraph 6(a) of Part A Instructions US-501 was subsequently amended on April 28, 1938 to read in part as follows:

"'Prior to certifying a grant, the Social Security Board will approve the State Agency's budget for the quarter concerned, after such adjustment as the Board finds necessary in order to limit the grant to expense essential to proper administration of the State's Unemployment Compensation Law. The approved budget of the State Agency will be set forth by the Board * * * in such detail as it deems necessary, and will be transmitted to the State Agency, together with Form UC-105, notifying the Agency that a grant has been made. The approved quarterly budget shall be adhered to in all respects and encumbrances shall not be made for any item not authorized therein, except in such categories as specified no itemization, nor shall any encumbrances be made in an amount in excess of the pertinent amount in the approved quarterly budget, except as specified in Subsection (c) of this paragraph'. (Subsection (c) provides for the transfers between offices within the categories of grants, and has no bearing on the questions propounded.)

"In the preparation of budgets for the Unemployment Compensation Commission of Alabama the Social Security Board required that salaries for personnel be itemized, that amounts for travel be itemized, and equipment to be purchased itemized.

"Out of funds received by the Commission as interest on delinquent contribution payments the Chairman of the Commission employed and paid employees whose names were never listed on budgets submitted to

and approved by the Bureau of Unemployment Compensation. Out of such fund, known as the 'Interest and Penalty fund', the Chairman also purchased equipment without the same having been previously included in a budget approved by the Bureau. He also authorized and paid out of such fund amounts to employees of the Commission as travel reimbursement and per diem allowances, which amounts were never included in any budget submitted to the Bureau. Such travel reimbursement and per diem allowances were at the same rates prevailing in the administration of the government of the State of Alabama.

"On May 12, the then Chairman of the Commission, Mr. M. H. Harper, Mr. J. Eugene Foster, General Counsel of the Commission, and Messrs. Paul E. Batzell and R. G. Wagenet of the Bureau of Unemployment Compensation, entered into the following agreement, subject to the approval of the Alabama Unemployment Compensation Commission:

"'AGREEMENT WITH THE ALABAMA UNEMPLOYMENT COMPENSATION COMMISSION IN RESPECT TO HANDLING OF THE INTEREST AND PENALTY ACCOUNT AS PART OF THE ADMINISTRATION ACCOUNT

"'Mr. Malcolm H. Harper, Chairman of the Alabama Commission, Mr. J. E. Foster, General Counsel of the Alabama Commission, and Messrs. Paul E. Batzell and R. G. Wagenet of the Bureau of Unemployment Compensation have agreed upon the following solution for the handling of the interest and penalty account:

"'1. That the funds collected in the said account will be commingled with the funds in the administration account, and the balance thereof shall be reported as part of the unencumbered balance.

"'2. That no expenditures will be made from the interest and penalty account as such.

"'3. That all expenditures from the administration account, which will hereafter include the interest and penalty account, will be made on the basis of the approved budget, that is, in conformity with the estimated items submitted to and approved by the Board.

"'4. That in any case in which the Alabama Unemployment Compensation Commission believes that an unjustifiable deletion or elimination has been made from the budget as submitted, such deletion or elimination will be brought to the attention of the Bureau or its representatives, and a statement will be rendered the Alabama Agency showing the reasons for and justification of such deletion or elimination. Nothing in the foregoing is intended in any way to preclude favorable action by the Bureau upon such requests, nor, on the other hand, will the agency in any way be precluded from renewing any original justification.

"'This agreement will be made retroactive to April 1, 1938 and in order to account for those expenditures which would, in the absence of this agreement, be made from the interest and penalty account, all such expenditures shall be transferred to the administrative budget. In case

sufficient funds are not available in the respective categories, the usual request for transfer of funds or additional funds to meet these expenditures will be made by the agency.

" 'This agreement is subject to the approval of the Alabama Unemployment Compensation Commission.'

"This above mentioned agreement was never approved by the Alabama Unemployment Compensation Commission.

"Subsequent to the date of said agreement, and on July 14, 1938, Mr. M. H. Harper, then Chairman of the Commission, Messrs. Lucien C. Brown and James A. Lipscomb, representing the Unemployment Compensation Commission of Alabama, and Messrs. Frank Bane, Paul E. Batzell, and F. C. Croxton, representing the Social Security Board and the Bureau of Unemployment Compensation, entered into the following agreement:

" **'Disposition of the Alabama Interest and Penalty Account**

" 'In accordance with the Social Security Act, the policy of the Social Security Board is that necessary funds will be made available to the State for proper administration of the State Unemployment Compensation Law. Such funds will be made available on the basis of quarterly and supplementary budgets submitted by the State and approved by the Social Security Board, after taking into consideration such other funds as are available to the State agency for such administrative purposes.

" 'The Alabama Unemployment Compensation Law provides that funds derived from interest and penalties shall go into the administrative funds for the Alabama Unemployment Compensation Commission. The Alabama Commission contends that it has authority to make expenditures from the Interest and Penalty Account outside of and in addition to the budget which the Board approved as the basis of the Board's grant to the Alabama Unemployment Compensation Commission.

" 'July 14, 1938

(INITIALED)

M. H. H.
L. C. B.
J. A. L.
F. B.
P. E. B.
F. C. C.'

"The Unemployment Compensation Commission, at a meeting held by it on the twenty-seventh day of January, 1939, at which meeting the Chairman and the two Associate Commissioners attended, the following resolution was unanimously adopted:

" 'BE IT RESOLVED that the Commission formally validate, confirm and ratify all salaries, expense accounts and per diem allowances paid by the Alabama Unemployment Compensation Commission to its employees, officers and agents since January 1, 1936;

"'BE IT FURTHER RESOLVED that the Commission formally validate, confirm, and ratify all the acts of the Commission, its members, officers, agents and Executive Director, including contracts, leases, purchases of supplies, equipment, and employment of personnel, and all of the acts done in furtherance of the performance of the functions of the Alabama Unemployment Compensation Commission, whether in strict compliance with the merit regulation adopted by the Commission, or in strict compliance with any other regulation promulgated by the Commission or by the Social Security Board. This applies to expenditures made from the so called "interest and penalty fund" as well as such expenditures from the so called "administrative fund". Expenditures heretofore made by the Commission, its officers, agents or employees from the so called "interest and penalty fund" and from the "administrative fund" are hereby specifically ratified, confirmed and validated.'

"I respectfully request your opinion as to whether the expenditures mentioned above made by the Chairman of the Unemployment Compensation Commission of Alabama or by the Commission from the money collected as interest on delinquent contribution payments were properly and legally made, and whether the said Commission had the right and authority, under the provisions of the Unemployment Compensation Act of Alabama and the Social Security Act, to make such expenditures in the administration of the Unemployment Compensation Law, even though requests for the expenditures of such sums were not made of the Social Security Board in any budget submitted to it, and such expenditures have never been approved by the Board."

In reply, I wish to advise that, in my opinion, the memoranda contained on pages four, five and six of your letter have no bearing on the decision reached and are dismissed from further consideration in determining the answers to your questions. The first memorandum mentioned is headed "Agreement with the Alabama Unemployment Compensation Commission in respect to the handling of the interest and penalty account as part of the administration account." This was a tentative agreement which by its very terms was subject to the approval of the Alabama Unemployment Compensation Commission. As stated in your letter this agreement was never approved by the Commission. It is, therefore, obvious that such purported agreement was not binding on the Commission. The second memorandum is headed "Disposition of the Alabama Interest and Penalty Account." As will be seen from a study thereof such memorandum embodies no agreement whatsoever with respect to expenditures from the Interest and Penalty Account. It merely sets out the contention of the Social Security Board on the one hand, and the contention of the Alabama Unemployment Compensation Commission on the other hand.

The provisions of the Unemployment Compensation Law of Alabama, (General Acts of 1935, pages 950-967) created the Unemployment Compensation Commission of Alabama and provided its duties, functions and powers. It is axiomatic that the Commission and the Chairman of the Commission had such rights and powers as were specifically given to them by the Act itself, and if no conditions or prohibitions appear in the Act against the exercise of such powers, it would seem obvious that the Chairman or the Commission acted legally and properly in the proper exercise of such powers.

I wish to refer you to Sections 10(a), 14(b) and 16(a) of the Unemployment Compensation Act of Alabama, (General Acts, 1935, page 950) as set out in your request.

It is clear that the Commission had the right to make an expenditures from the Administration Fund, if such were "within its means and consistent with the provisions of this Act," necessary or suitable to administer the Act. It is readily seen that interest collected on tardy contributions was required to be paid into the Administration Fund, and that the Administration Fund was to be "expended solely for the administration of this Act and other purposes herein specified."

While it might be said that the rights set out next hereinabove reposed in the Commission, the Commission by a resolution, on the twenty-seventh day of January, 1939, formally validated, confirmed and ratified "all the acts of the Commission, its members, agents and Executive Director, including contracts, leases, purchases of supplies, equipment, and employment of personnel, and all other acts done in furtherance of the performance of the functions of the Alabama Unemployment Compensation Commission, whether in strict compliance with the merit regulation adopted by the Commission, or in strict compliance with any other regulation promulgated by the Commission or by the Social Security Board. This applies to expenditures made from the so-called interest and penalty fund as well as such expenditures from the so-called Administrative Fund. Expenditures heretofore made by the Commission, its officers, agents or employees from the so-called Interest and Penalty Fund and from the Administrative Fund are hereby specifically ratified, confirmed and validated."

An act which can be authorized prior to its being performed can be ratified after its performance. **Terrell v. Kay,** 176 So. 823, 235 Ala. 54.

Section 302(a) of Title III of the Social Security Act made provision for grants to the Unemployment Compensation Commission of Alabama for such amounts as the Board determined to be necessary for the proper administration of the Unemployment Compensation Law in Alabama. This section is quoted in your request for opinion, supra, to which I refer you.

This above mentioned section did not forbid the Commission from making expenditures from funds collected as interest on delinquent contribution payments, but simply determined the amounts of money which the Board would certify to the Secretary of the Treasury as being what it deemed necessary for the proper administration of the law in Alabama.

Instructions issued by the Social Security Board in January, 1938, Numbered Instructions UC-501 and amendments thereto issued subsequently, provided that expenditures by State Unemployment Compensation Agencies were not to be made outside of the budgetary items, but such instructions cannot supersede the plain and unambiguous language embodied in the Unemployment Compensation Act of Alabama.

Inasmuch as amounts collected by the Commission as interest on delinquent contribution payments were deposited in the administration Fund provided by the Act, and expenditures were made from such fund for employment of personnel and purchases of equipment, which the Commission deemed necessary for the effective administration of the Unemployment Compensation Law in Alabama, I am of the opinion that such expenditures as were made by the Chairman of the Commission, which were subsequently ratified by the Commission, and which were for employment of personnel and purchase of equipment, which the Commission deemed necessary for the

effective administration of the Unemployment Compensation Law in Alabama, were legally and properly made.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 22, 1939.

Hon. A. H. Collins,
Superintendent of Education,
Montgomery, Alabama.

Deeds—Schools—

Under deed with reversionary clause that upon non-user by grantee, property reverts to grantor; property reverts to grantor upon voluntary abandonment of property by grantee.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 22, 1939, in which you request my opinion as follows:

"On July 1, 1897, the Sylacauga Improvement Company by H. C. Bain, President, deeded to the Commissioners of the State Agricultural School and Experiment Station in the Fourth Congressional District of Alabama a certain plot of land in Block 108, Sylacauga, Alabama, with a Reversion Clause when and if said Commissioners cease to use the property for the use and benefit of said State Agricultural School and Experimental Station. At a later date, namely, March 25, 1923, the Sylacauga Improvement Company through its president, J. W. Brown, deeded to the city of Sylacauga all its interests in the above mentioned property.

"Pursuant to an Act of the 1935 Legislature an agreement between the State Board of Education and the Sylacauga City Board of Education was made bringing the Fourth District Agricultural School under the administration of the Board of Education of the City of Sylacauga. It now appears that the State Board of Education no longer needs the property referred to above for the use of the Agricultural School.

"In the light of the facts outlined and the changes in the law since 1897, we desire your opinion on the following points:

"(1) If the Agricultural School ceases to use this property, does it automatically revert to the City of Sylacauga?

"(2) If it does not revert, has the State Superintendent of Education, with the approval of the Governor, the right to deed the property to the City of Sylacauga?"

In reply, I wish to advise you that in my opinion the property in question reverts to the Sylacauga Improvement Company by the terms of the deed dated July 1, 1897, upon its non-user for the purposes outlined in the deed. Of course, the interest of the State in and to the property ceases upon such reversion.

The reversionary clause is as follows:

"To Have and to hold * * * provided always nevertheless that if at any time hereafter the above described property or any part of it should be converted into any other use, than for use of State Agricultural School and Experimental Station in the Fourth Congressional District of Alabama, and such other improvements as may be advantageous and of use to the promotion of the use of said property for said object, then and in that case the said lot shall revert to the party of the first part and to its successors and assigns."

You state in your statement of facts that under a 1935 law an agreement has been perfected between the State Board of Education and the City Board of Education of Sylacauga whereby the City Board of Education shall take over and operate the Fourth District Agricultural School. You further state that it now appears that the State will no longer need the property herein considered.

It is my opinion that when the State breaches the conditions of the deed by an abandonment of the property, such breach would bring about the operation of the reversionary clause of the deed, and the property therein described would revert to the original grantors or to its successors or assigns. The abandonment must be voluntary on the part of the State to bring about such reversion. **Shannon v. Long,** 180 Ala. 128, 60 So. 273; **Dick v. Darden,** 204 Ala. 400, 85 So. 369.

I wish to further call your attention to the fact that whatever right title and interest might remain in the original grantors has passed to the City of Sylacauga, under the deed executed May 25, 1923.

In my judgment the deed executed May 25, 1923 is a valid conveyance and becomes operative upon the happening of the contingency of the State's voluntary abandonment of the property for the uses set out in the original deed to the State.

In some jurisdictions it is held that a reversionary interest may be conveyed, and while I find no Alabama cases exactly in point I do find an analogous situation outlined in the case of **Jackson vs. Snodgrass** 140 Ala. 365, 37 So. 246, which held, "While a reservation can only be to the grantor in a deed, said grantor may subsequently convey the thing reserved."

I call your attention to the fact that such reversion is not automatic. Some act of re-entry or re-possession must be performed by the parties possessing the reversionary interest to give full force and effect to the reversionary provisions of the deed.

See 18 Corpus Juris, page 376, (426). See also Quarterly Report of Opinions of Attorney General Vol. VI, page 54, opinion addressed to Hon. O. C. Weaver, Brewton, Ala.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 22, 1939.

Hon. B. F. Burch,
Tax Collector,
Russell County,
Seale, Alabama.

Taxation—Real estate of taxpayer who has failed to pay escaped taxes on personal property consisting of stocks and bonds is subject to levy for satisfaction of such taxes.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your letter of May 2, 1939, in which you request my opinion as follows:

"Last Fall Hon. R. Lewis McAdory who was working with the State Tax Commission of Alabama made a good many Escapes on personal property consisting of Stocks & Bonds in this County and the most of the parties have paid though there are some who have not and don't seem to think that they will have to do so. Some of these parties have Real Estate that they paid the Taxes on some time ago and I am writing you to find out if the Real Etate would be good for these Escapes and if so what method to proceed."

It is my conclusion that real estate of a taxpayer who has failed to pay escaped taxes on personal property which consists of stocks and bonds is subject to levy for the satisfaction of such taxes.

Your attention is directed to Subsections (e) and (f) of Section 2 of Act No. 88, General Acts of Alabama, 1936-1937, Page 106, which are as follows:

"(e) There shall be no ad valorem tax assessed or collected upon any security included in any list on account of which the tax prescribed by law shall have been paid, either State, County or Municipal, but nothing in this act shall be held or construed to exempt from taxes imposed by law any securities on which the taxes, which are properly due, have not been paid at the time of the passage and approval of this act. (f) In the event the securities hereinbefore mentioned are not listed and

the privilege or license tax paid as herein provided, the same shall become liable for ad valorem taxes."

You will note that said Subsection (f) of Section 2, specifically provides that in the event securities are not listed and the privilege or license tax paid, the same shall become liable for ad valorem taxes.

This office has ruled that a lien attaches on all property of a taxpayer for taxes due on any of his property, and that the payment of the tax due on one parcel does not relieve such parcel from being subject to levy for any other taxes due by the taxpayer. **Quarterly Report of the Attorney General,** Vol. XIV, Page 133; **Biennial Report of the Attorney General,** 1934-1936, Page 461.

Section 170 of the General Revenue Act of 1935, page 339, provides that after the first day of January of each year, the tax collector must proceed to levy upon the personal property of delinquent taxpayers for the payment of any taxes.

The procedure for levying upon and selling shares of stock for payment of taxes assessed against the owner is provided by Section 176 of the General Revenue Act of 1935, page 341, and is as follows:

"The shares or interest in the stock of private corporations are subject to levy and sale for the payment of all taxes assessed against the owner thereof. To accomplish such levy and sale, the tax collector shall make out and certify to the judge of probate a bill against such owner for the amount of the taxes due from him and any fees due the assessor or collector, and upon the approval thereof, by the judge of probate, in writing endorsed thereon, such bills shall operate as a fieri facias, and thereupon such shares and interest may be, by the tax collector or his deputy, levied upon and sold for the payment of such taxes, interest and fees, and all costs, without having or obtaining the possession of said stock, by endorsement on the bill, approved by the judge of probate, stating the number of shares or other interests on which the levy is made, and giving notice thereof to the custodian of the books of transfer of such corporation, if he be known and reside within the State, or if he be unknown, or if he resides without the State, by posting at the courthouse door of the county, and by publication for three successive weeks in a newspaper published at or near the principal place of business of such corporation; all transfers of stock made in good faith, for a valuable consideration before notice of the levy is given, are valid and operative, and must prevail over the levy. The levy and sale thereunder may be made in the county of the residence of the taxpayer, or in the county in which the corporation has its principal place of business; and on making the sale, the tax collector must make to the purchaser a transfer in writing; and the purchaser has the right to require the proper officer to register such transfer on the books of the corporation, and with or without such registry, is entitled to all the rights and interests of the taxpayer as whose property such stock was sold."

Section 177 of the General Revenue Acts of 1935, page 341, prescribes that where no personal property can be found out of which the taxes of a delinquent taxpayer can be collected, or an amount insufficient to fully satisfy such taxes, the real estate of such taxpayer, or the real estate upon

which such taxes are a lien, shall be sold for the payment thereof, or of the balance due thereon. But the failure of the tax collector to so exhaust such personal property shall not invalidate the sale of any real estate.

Therefore, from the above it will be seen that it is your duty to levy first upon the personal property and if same is not sufficient to satisfy the taxes due or can not be located, you must proceed against the real estate of such delinquent taxpayer, even though taxes assessed against said real estate have been paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 22, 1939.

Hon. Fred Grantham,
Clerk of Jury Commission,
Geneva County,
Geneva, Alabama.

Jury Commission—Jury Commission held not entitled to compensation for services performed individually in various precincts of the county.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your request for official opinion dated July 18, 1939, which is as follows:

"Are members of the Jury Commission entitled to compensation as provided by Act No. 59, Alabama General Laws, Regular Session, 1939, under the following conditions?

"(a) For work done as members of the Jury Commission, but done individually in the different precincts of the County?

"The question has been raised as to whether or not a member of the Jury Commission can be properly and legally paid for work done as member of the Jury Commission if a quorum not present while such work is being done. If a member of the Jury Commission, at the instance of the Jury Commission, goes into the different precincts of the County and engages in the performance of his duties as such member of the Jury Commission, without a quorum being present while he is so engaged in the performance of such duties, is he entitled to the compensation as provided by Act No. 59, above referred to, for such duties performed?"

In reply, I wish to advise that in my opinion your question must be answered in the negative.

I call your attention to Section 17 of Act No. 59 of the General Laws of 1939, approved March 2, 1939.

> "Section 17. The Jury Commission is charged with the duty of seeing that the name of every person possessing the qualifications prescribed in this Act to serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box. The Jury Commission must not allow initials only to be used for a juror's name but one full Christian name or given name shall in every case be used and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name shall also be entered as well as his true name. The Jury Commission shall require the Clerk of the Commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories and any and every other source of information from which he may obtain information, and **to visit every precinct at least once a year to enable the Jury Commission to properly perform the duties required of it by this act.** In counties having a population of more than 118,000 and less than 300,000, according to the last or any subsequent Federal Census, the Clerk of the Jury Commission shall be allowed an amount not to exceed Fifty Dollars ($50.00) per calendar year to defray his expenses in the visiting of these precincts, said sum or so much thereof as is necessary to be paid out of the respective county treasury upon the order of the President of the Jury Commission." (Emphasis supplied)

You will note from reading the above quoted section that the work to be done in the various precincts of the county is to be performed by the Clerk of the Jury Commission. I find no provisions in the above named law to require or allow compensation for any services to be performed "in the various precincts of the county," by the Jury Commissioners themselves and individually. I wish to further call your attention to Section 6 of the above named act, which provides as follows:

> "Section 6. In the event that two of the Jury Commission are absent from the State, sick, or for any reason cannot discharge the duties imposed upon them by this article, then the other member of the Commission shall notify any judge of a Court of record residing in the County to appear and take the place of the absent members, and in such case one judge and one member shall constitute a quorum. If no such judge is present or able to serve, the other member must immediately notify the Governor, who shall appoint competent persons to act as members of the Commission until the regular members are present and able to discharge their duties."

In my judgment, the intention of the Legislature is clear that two members of the Jury Commission must be present in order to constitute a quorum for the transaction of any business of the jury Commission. You will note that every precaution is taken to so provide. See Section 6 of the Act, quoted supra, and also Sections 4 and 7 which provide as follows:

> "Section 4. The members of the Jury Commission shall elect one of their number President of the Commission. Any two members of the

Commission shall be a quorum for the transaction of business. Every member of the Commission before entering upon the discharge of his duties must take the oath of office prescribed by section 279 of the Constitution and must be commissioned by the Governor."

"Section 7. Should any member of the Commission become disqualified under the provisions of this Act, the fact of such disqualification and the ground or reason therefor shall be certified to the Governor by the judge of the Circuit Court of the county, or in counties in which there is no Circuit Court by the judge of a court having the jurisdiction of a Circuit Court, and when so certified his office shall become vacant, and the Governor shall appoint his successor to fill out the unexpired term. In case of any vacancy from any other cause in the office of a member of the Commission the Governor shall appoint a member to fill such vacancy who shall hold office for the unexpired term."

In my judgment, the particular duties set out in the above considered act, Section 11, when considered with the provisions of Section 17, supra, for the Clerk of the Jury Commission, covers the very work that you indicate in your request as having been performed by the Jury Commission.

Section 11, supra, provides as follows:

"Section 11. The clerk of the Jury Commission shall, under the direction of the Jury Commission obtain the name of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the Jury Commission."

The premises considered, it is my judgment that the services of going into each precinct and performing work for the Jury Commission is a duty provided for the Clerk of the Jury Commission and is not contemplated by the Jury Commissioners themselves. It is further my judgment that the services of the Jury Commission are confined to the services performed in a meeting assembled wherein must appear at least two members of the Commission or a substituted member as provided for in the Acts of 1939, supra, before compensation may be paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 22, 1939.

Hon. J. F. Posey,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Counties—

1. The Courts of County Commissioners or Boards of Revenue have no authority to expend gasoline funds in securing rights-of-way

along and outside of the regular highways of the State for a beautification program.

2. Courts of County Commissioners or Boards of Revenue authorized to use gasoline fund to purchase rights-of-way.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your letter of June 23, 1939, requesting my official opinion as follows:

"I will thank you to give me an opinion on the following questions:

"1. Have the Courts of County Commissioners or Boards of Revenue the right according to law to spend 'gasoline funds' in securing rights of way along and outside of the regular highways of the State, for a beautification program?

"2. If a person owned a small lot of just an acre or two with his home located on this lot, would our Board of Revenue have authority to buy another lot off the right of way to rebuild his residence and to pay for it out of the 'gasoline fund.'"

In answer to your first inquiry, it is my conclusion that the Courts of County Commissioners or Boards of Revenue have no authority to expend "gasoline funds" in securing rights-of-way along and outside of the regular highways of the State for a beautification program.

The use of the gasoline tax by counties is governed by Schedules 156.9, 156.10 and 156.11 of Section 348 of Act No. 194, General Acts of Alabama, 1935, with the exception of Special or Local Acts of 1936 dealing therewith. Said Special or Local Acts of 1936 have no bearing on the instant inquiry.

Said Schedule 156.9, supra, is in pertinent part as follows:

"Such funds when received by the County Treasurer shall be covered into the county road and bridge fund, and shall be **expended exclusively in the construction, maintenance and repair of the public roads and bridges in such county.**" (Emphasis supplied)

Said Schedule 156.11, supra, is in pertinent part as follows:

"* * * and such funds shall be used by the several counties of the State exclusively for the **construction, maintenance, supervision and policing of the public roads and bridges in the respective counties;** provided, however, that the Board of Revenue or other such governing body of a county may direct the State Tax Commission to pay over to the State Highway Department such part of said funds as may be agreed upon by the Board of Revenue or such other governing body of any county, and the Governor of the State of Alabama, which said funds **are to be used in the construction and maintenance of roads in said county,** to be agreed

upon by the Board of Revenue of such county, or such other governing body, and the Governor of the State of Alabama." (Emphasis supplied)

You will note from the above quoted schedules that the only purposes to which the gasoline tax fund can be applied is for the construction, maintenance, supervision, repair or policing of the roads or bridges of a county. This office has ruled that unless the gasoline tax fund is put to a use as enumerated above, such expenditure is illegal. I refer you to **Quarterly Report of the Attorney General, Vol. I, pp. 6, 128 and 186; Quarterly Report of the Attorney General, Vol. III, p. 207.**

Since the acquisition of additional rights-of-way along and outside of the regular highways of the State for beautification purposes cannot be considered as an expenditure for construction, maintenance, supervision, repair or policing of the highways, it is my opinion that same would be without authority of law.

In answer to your second inquiry, it is my conclusion that if the purchase of the lot in question off of the right-of-way is for the purpose of acquiring a right-of-way for the construction of a highway, and not merely in the furtherance of a beautification program, such expenditure may be made from the gasoline fund.

This office has held that moneys derived from the excise tax on gasoline can be legally expended for the purchase of rights-of-way as a right-of-way must be obtained before a road can be built and the obtaining of such right-of-way is incident to the construction of the road and is a part thereof. **Biennial Report of the Attorney General, 1930-1932, p. 1017; Quarterly Report of the Attorney General, Vol. II, p. 82.**

Therefore, if it is necessary to purchase another lot for an individual to rebuild his residence upon in order to acquire said individual's lot for the construction of a right-of-way, it is our opinion that the county is authorized to use the gasoline fund for such a purpose.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 25, 1939.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Sheriff's Feed Bills—Audit of same—

County liable for pro rata share of the cost of making an examination of the sheriff's feed bills.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of June 13, 1939, in which you request my opinion as follows:

> "We have two State Examiners in this County who are auditing feed bills of the Sheriff and are going back some ten or fifteen years. There is not the slightest chance of the auditors recovering one cent for the County, since the State pays all the Sheriff's feed bills and if any money is recovered it will be for the State and not for the County.
>
> "Please advise me if the County should have to pay two-thirds of the costs of this examination. I can see no justice in forcing the County to pay for examination of purely State matters."

In answering your request it is necessary for us first to determine the authority for, and method of, assuming the burden of payment for an audit of the feed bills of a sheriff.

On page 601, General Acts 1935, we find Act No. 218 which was approved July 13, 1935, stating in Section 3, thereof, as follows:

> "Section 3. Where the state is not interested in the examination or where the examination refers altogether to a county examination, the Board of Revenue, Commissioners Court of the County, shall pay out of general funds of the County the expense of examination, but if the examination **is of matters belonging to the state and the county** then the state and county are each to share their pro rata share of the expense of examination to be determined by the Comptroller with the approval of the Governor, and if the examination is a matter belonging or appertaining to the state alone then the state shall pay all the expenses of examination." (Emphasis supplied)

From a reading of the above quoted section it is apparent that in order for the county to become indebted for all or any part of the cost of the audit of any of its officer's books, the examination or audit must be (1) one that "refers altogether to a (the) county" or (2) "of matters belonging to the state and the county". In order for your county to become liable for payment of any part or all of the burden of the examination it is necessary that the particular audit (in this particular, the sheriff's feed bill) come within the purview of either (1) or (2) set out above.

Clearly the examination of the sheriff's feed bills will not be an examination referring to the county alone ((1), supra), since the state under the authority of Code Sections 4825 through 4837 of the Code of Alabama for 1923 must pay for the feeding of prisoners.

In order for your county to become liable for its pro rata share of the cost of this examination, the audit must come within the purview of No. 2 above, i. e., "of matters belonging to state and county". It is quite true that the state pays all the feed bills of the sheriff used for the feeding of **prisoners; but this does not include wards** of the court or others of like category that

may be in prison. The cost of feeding juveniles in jail is in some instances upon the county. Likewise, insane persons temporarily imprisoned in the county jail are fed at the expense of the county.—Biennial Report of Attorney General 1934-36, p. 737 and opinions cited. Therefore, it is seen that the audit of the feed bills of the sheirff is not purely a state matter but one of state and county interest.

It is my opinion, therefore, that the audit of the sheriff's feed bills is a matter "belonging to the state and county" and that the county is subject to their pro rata share of the expense of this examination.

Section 3 of Act No. 218, General Acts 1935, supra, states, "the state and county are each to share their pro rata share of the expense of examination to be determined by the comptroller with the approval of the Governor".

The office of Comptroller was abolished by Section 11 of Act No. 112, Regular Session 1939, and all of its duties were transferred to the Department of Finance. Therefore, the authority which the Comptroller formerly possessed to fix the pro rata share of the county, in the expense of such examinations, with the approval of the Governor, is now vested in the Director of the Department of Finance, who may under the authority of Section 26 of the Act, assign such duties to any division of his department duly created.

The premises considered, it is my opinion that the expenses of the audit of the sheriff's feed bills should be shared on a pro rata basis by the county and the state in accordance with the statutes governing same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 25, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Schools—Demonstration Agents—

County Boards of Education authorized to pay salaries of farm or home demonstration agents out of certain funds under its control subject to limitations set out in opinion.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion of June 26, 1939, is as follows:

"Please refer to your rulings on Pages 529 and 783 of the Biennial Report of 1936-1938.

"There is still some confusion regarding the County Boards of Education paying part or all of a salary of a County Home Demonstration Agent. On this account, I would like to be advised in answer to the following questions:

"1. Can the salary of a County Home Demonstration Agent be legally paid from the two mills of the County General Fund that is not a part of the Minimum Program Fund?

"2. Can the salary of the Home Demonstration Agent be paid from a Matriculation Fee Fund?

"3. Can the salary of the Home Demonstration Agent be paid from funds appropriated to the Board of Education by the County Board of Revenue?"

In an opinion of this office rendered to the State Superintendent of Education on April 8, 1935, it was held that County Boards of Education were authorized to pay out of the "Bonus Fund" part of the salary of farm demonstration agents. This opinion was based on the theory that such expenditure was for "educational purposes." "Educational purposes" as therein used, is, in my opinion, synonymous with "school purposes." Farm demonstration agents and home demonstration agents are in the same category, both being appointed under the same authority of law. (See Biennial Report of Attorney General, 1934-1936, p. 741.)

A later opinion found in Biennial Report of Attorney General, 1936-38, p. 529, held that there was no authority to pay salaries of farm or home demonstration agents out of the Minimum Program Fund. (The syllabus of said opinion is too broad and does not conform to the holding of said opinion.) The appropriation previously known as the "Bonus Fund" is now appropriated to the Minimum Program Fund. (See Acts 1935, p. 751.) In other words, there is now no "Bonus Fund."

However, if there are other school funds that may be used for "educational purposes" or "school purposes" in general, without specific limitations, the salaries of farm or home demonstration agents may be paid therefrom by County Boards of Education under the general theory enunciated in the opinion to the State Superintendent of Education of April 8, 1935, supra. We must, therefore, look to the purposes for which the three specific funds referred to in your inquiry may be expended.

By "the two mills of the County General Fund" as used in inquiry number one, I presume you refer to two mills of the County-wide three mill levy under Amendment III of the Constitution and Sections 261-293 of the School Code of 1927. Such a levy may be made for "public school purposes." However, the use of the proceeds of the levy may be limited to specific purposes such as the retirement of bonds, etc. If the use of the proceeds from the particular levy in question was not restricted and the levy was voted for "general public school purposes," it follows that your first inquiry should be answered in the affirmative.

By the "Matriculation Fee Fund," referred to in your second inquiry, I presume you mean the funds collected under Section 467 of the School Code of 1927 which is as follows:

"Section 467. Matriculation Fee May be Charged.—A matriculation fee may be collected for each semester from all pupils in accredited high schools, including County High Schools, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be, and the proceeds of such fees shall be expended under the direction of the County Board of Education or the City Board of Education as the case may be. A reasonable fee for library, laboratory and shop work may be required, the amount of such fee to be determined by the County Board of Education or the City Board of Education as the case may be."

Said section provides that the proceeds of such fees shall be expended under the direction of the County Board of Education or City Board of Education as the case may be, and contains no restrictions as to how and for what particular public school purpose matriculation fees may be used, but leaves the matter entirely in the hands of the school authorities therein named. Biennial Report of Attorney General, 1936-38, p. 115. Therefore, it follows that same may be expended for "school or educational purposes" under the direction of the County or City Board of Education which includes the authority to pay the salary of the farm or home demonstration agents. Your second inquiry should be answered in the affirmative under the above presumption. Cf. Biennial Report of Attorney General, 1936-38, page 115.

I am of the opinion that your third inquiry should be answered in the affirmative. Under the authority of Acts 1931, p. 616, county governing bodies are authorized to appropriate funds for the "support of the public schools" within the county.—Biennial Report of Attorney General, 1934-36, p. 616. An appropriation for "the support of public schools" in my opinion is tantamount to an appropriation for "school or educational purposes." Therefore, said appropriation may be used for the payment of the salaries of the farm or home demonstration agents.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

July 26, 1939.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

1. All personal property, including supplies, materials and equipment necessary for the proper operation of the Alabama Alcoholic Beverage Control Board except alcoholic beverages should be purchased by and through the Department of Finance.

2. Department of Finance does not have authority to lease property used by the Alabama Alcoholic Beverage Control Board. However, contracts for the repair or improvement of such real property located in the City of Montgomery should be made by and through the Department of Finance.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 28, 1939, which requests my opinion as follows:

"Please refer to an Opinion rendered Hon. John D. McNeil, Administrator of the Alabama Alcoholic Beverage Control Board under date of May 1, 1937, by Hon. A. A. Carmichael, Attorney General. In this Opinion, the Attorney General held that the Board might authorize the Administrator to make direct purchases of liquors and/or supplies and materials necessary for carrying into effect the general purposes of the Alabama Beverage Control Act. Sections 4, 6, 7 and 53 of the Beverage Control Act were reviewed in arriving at this conclusion.

"You are respectfully requested to again review the Sections above referred to together with Section 5 of the Beverage Control Act and advise if, in your opinion, any of these sections are in conflict with the functions and duties of the Department of Finance set out in Section 5 of the Department of Finance Act of 1939. You are specifically requested to clarify the following:

"1. May the Board authorize the Administrator to continue direct purchases of supplies, materials, and equipment, except alcoholic beverages, necessary to properly carry out the purposes of the Beverage Control Act or must such purchases be made by the State Purchasing Agent on requisition from the Board?

"2. May the Board continue to lease, occupy and improve any office, store or warehouse buildings, in the city of Montgomery, necessary to properly carry out the purpose of the Beverage Control Act?

"3. If the second question above is answered in the affirmative, may the Board contract for any repairs or improvements, including materials and/or labor, to leased property which is necessary to properly carry out the purposes of the Beverage Control Act?

The answer to your inquiries will depend upon whether or not the provisions of Act No. 112, H. B. 172, approved March 7, 1939, known as the "Department of Finance Act of 1939," conflict with the provisions of Act No. 66, H. B. 44, passed over the Governor's veto on February 2, 1937, (General Acts 1936-37, page 40), known as the "Alabama Beverage Control Act", which were considered in an opinion of this office rendered to the Administrator of the Alabama Beverage Control Board on May 1, 1937 (Quarterly Report of Attorney General, Vol. VII, page 87).

The title to the Department of Finance Act of 1939 is as follows:

"To create a Department of Finance of the State of Alabama and to provide for its personnel, powers, functions and duties and the performance thereof; to provide for the transfer to the Department of Finance of certain powers, functions and duties, appropriations, books, records, accounts, documents, papers, furniture, fixtures, supplies, material, equipment and other personal property, and employees from all departments and agencies of the State which now have any functions and duties conferred upon the Department of Finance by this Act, in-

cluding, among others, the Department of Examiners of Accounts, the Division of Departmental and County Audits in the office of the State Comptroller, the State Auditor, the State Department of Public Welfare, the State Treasurer, the Sinking Fund Commission, the State Comptroller, the office of the State Comptroller, the State Board of Administration, the Secretary of State, the Governor, the Secretary to the Governor, and the Public Works Board of Alabama; to abolish the Department of Examiners of Accounts, the Division of Departmental and County Audits in the office of the State Comptroller, the Sinking Fund Commission, the office of the State Comptroller, the Public Works Board of Alabama; to provide for the administration, management, supervision and control and the keeping of the records and accounts relating to the fiscal affairs and the fiscal procedure of the State, the drawing of warrants on the State Treasury, the preparation and execution of the budget, the making of budget allotments, the preparation of revenue and appropriation bills, **the acquisition** and distribution of personal property, the providing of printing and binding, **the management and servicing of the State Capitol and other buildings and property owned or leased by the State in the City of Montgomery,** the insurance of all State property, the providing of postage service, telephone services and certain personal services, the examination and audit of the records and accounts, and the supervision and control of and assistance in connection with the purchases, revenue, taxation, budgets, indebtedness and other obligations and the finances of the counties, municipal corporations, political subdivisions and local public bodies in the State, the making of financial studies and reports and the making of the annual financial report of the State, all by the Department of Finance; and to provide penalties and punishments for the violations of any of the provisions of this act; to repeal sections 1 to 9-A inclusive, of the Budget and financial Control Act of 1932, and other provisions of law in conflict with any provision of the Act to the extent of such conflict." (Italics supplied)

The sections of the body of the act which have a bearing on the questions presented are as follows:

"Section 3. CREATION OF THE DEPARTMENT OF FINANCE. There is hereby created the Department of Finance of the State of Alabama, which shall be an executive and administrative department in order to enable the Governor to exercise a direct and effective control over the finances of the State and in order to bring together in one department for purposes of economy and efficiency all matters pertaining to the finances of the State and the departments, boards, bureaus, commissions, agencies, offices and institutions thereof and, to the extent herein indicated, over the finances of the counties, municipal corporations, political subdivisions and local public bodies in the State, **and to furnish the physical facilities, equipment and supplies,** and, to the extent herein indicated, the personnel for the operation of the State and such departments, boards, bureaus, commissions, agencies, offices and institutions thereof. The Department of Finance shall have a seal, which shall be affixed to official acts and deeds of the Department of Finance and the Director of Finance by him." (Italics supplied)

"Section 5. FUNCTIONS AND DUTIES OF THE DEPARTMENT OF FINANCE. The general functions of the Department of Finance shall be as follows: * * * (4) To purchase all personal property, except alcoholic beverages (which shall continue to be purchased by the Alcoholic

Beverage Control Board) for each department, board, bureau, commission, agency, office and institution of the State. (5) To make and supervise the execution of all contracts and leases for the use or acquisition of any such property. * * * (7) To manage, supervise, maintain, repair, improve, light, heat and clean the State Capitol and all other property owned or leased by the State and located in the City of Montgomery. (8) To maintain perpetual inventories of all furniture, fixtures, supplies, materials, equipment and other personal property on hand and of all such non-consumable personal property as may have been or as may be assigned to any department, board, bureau, commission, agency, office or institution of the State or to any officer or employee thereof, to make such periodic examinations of such property as may be necessary and to hold responsible any officer or employee who fails or refuses to account for any such property for which he is chargeable. * * *"

"Section 6. TRANSFER OF FUNCTIONS AND DUTIES OF OTHER STATE DEPARTMENTS AND AGENCIES TO THE DEPARTMENT OF FINANCE. All functions and duties heretofore assigned by law to any department, board, bureau, commission, agency or office of the State but assigned by this Act to the Department of Finance shall be performed by the Department of Finance; and each such department, board, bureau, commission, agency or office is hereby relieved of such functions and duties, and the following sections which provide for specific transfers of certain functions and duties to the Department of Finance are not intended to limit the generality of the foregoing provision, it being the intention of the Legislature in enacting this Act to bring together all such functions and duties in the Department of Finance for purposes of efficiency and economy."

"Section 24. THE DIVISION OF SERVICE: THE CHIEF OF THE DIVISION. There is hereby established in the Department of Finance the Division of Service, which shall be headed by and be under the direction, supervision and control of an officer who shall be designated the Chief of Service, to be appointed by the Director of Finance, with the approval of the Governor. The functions and duties of the Division of Service shall be as follows: * * * (5) With the approval of the Governor, to allocate space in the Capitol and in all buildings owned or leased by the State in the City of Montgomery for the use of the departments, boards, bureaus, commissions, agencies and offices of the State. (6) To provide a guard, watchman and police service for the Capitol and the other buildings and property owned or leased by the State and located in the City of Montgomery. (7) To maintain a permanent and perpetual inventory of all State furniture, fixtures, equipment and non-consumable personal property and to require all officers and employees to whom any State property has been assigned or entrusted to account therefor periodically. (8) With the approval of the Governor, to transfer between departments, boards, bureaus, commissions, agencies, offices and institutions of the State any furniture, fixtures, supplies, material, equipment or other personal property. (9) To sell, exchange or otherwise dispose of any personal property of the State determined by the Director of Finance not to be needed for public use or to have become unsuited for such use. * * *"

It will be noted from the above that there is a distinct separation of real and personal property. The Director of Finance has a larger latitude over personal property than real property. Therefore, your inquiries with respect to each class of property respectively, will be treated separately.

First, let us consider your inquiry No. 1, which deals with personal property. The title of the act provides for the acquisition and distribution of personal property. Sections 3, 5(4, 5, 8), 6, 24(7, 8, 9) deal with personal property. To repeat, Section 5(4) provides as follows:

> "* * * (4) To purchase all personal property except alcoholic beverages (which shall continue to be purchased by the Alcoholic Beverage Control Board) for each department, board, bureau, commission, agency, office and institution of the State."

This section is in accord with the title and general theory and purpose of the act. The fact that the purchase of alcoholic beverages was excepted shows a legislative intention to include all other personal property for each department, board, bureau, commission, agency, office and institution of the State. It follows from the above that your first inquiry should be answered in the affirmative.

Now let us consider your inquiries Nos. 2 and 3, which deal with real property.

That part of the title of the act relative to real property is: "The management and servicing of the State Capitol and other buildings and property owned or leased by the State in the City of Montgomery."

Sections 3, 5(7), 6, 24(5, 6) have a bearing on this question. Sections 5(7) and 24(5, 6) deal specifically with real property. Nowhere in the act is there any provision which specifically authorizes the Department of Finance to lease real property for the State or any of its departments, bureaus, boards, commissions, agencies, offices or institutions.

The only provision in the act in question which may be construed as authority for the Department of Finance to lease real property for the Alabama Beverage Control Board is that part of Section 3 which is as follows: "And to furnish the physical facilities, equipment and supplies, etc. * * *."

The words "furnish physical facilities" may have a broad and unlimited meaning, but I do not think that such are sufficient to authorize the Department of Finance to lease real property for the Alabama Beverage Control Board. Since the meaning of this phrase is doubtful to this extent, we must look to the whole context of the act, both the title and the body thereof, in arriving at the legislative intention.

While the title to an act cannot serve to constitute a contradiction of the plain terms in the enacting clause of the act, yet the recitals of the titles are available aids to the removal of ambiguity and uncertainty in the enacting clause of the act. In questions of doubt in respect to ambiguous legislative context, the preamble of an act may be resorted to to ascertain the intent and dissolve doubt. In arriving at the intent of the law, the whole act—title and enacting clauses—must be read.—**Wages v. State,** 225 Ala. 2, 141, So. 707, and cases therein cited.

Applying the above rule in the instant case, let us look to the title of the act in question, which provides for the managing and servicing of the State Capitol and other buildings and property owned or leased by the State

in the City of Montgomery. The words "managing and servicing" as therein used are not, in my judgment, sufficiently broad to authorize the leasing of real property. The words "furnishing physical facilities" as used in Section 3, supra, must be read, due to their ambiguous meaning, in connection with that part of the title just quoted.

The premises considered, it therefore follows that your second inquiry in regard to the leasing of any office, store, or warehouse building in the City of Montgomery, necessary to properly carry out the purposes of the Beverage Control Act, should be answered in the affirmative. The provisions of the Alabama Beverage Control Act in regard to the leasing of property as construed in the opinion rendered to the Administrator of the Alabama Beverage Control Board on May 1, 1937, supra, are still applicable.

However, in answer to your inquiries Nos. 2 and 3, relative to contracting for repairs and improvements, including materials and/or labor, on property leased by the Alabama Beverage Control Board in the City of Montgomery, it is my opinion that such improvements and repairs should be made or done by and through the Department of Finance, in accordance with the provisions of the Department of Finance Act of 1939. I wish again to quote Section 5(7), which is as follows:

> "(7) To manage, supervise, maintain, repair, improve, light, heat and clean the State Capitol and all other property owned or leased by the State and located in the City of Montgomery."

This section specifically authorizes the repair and improvement of property leased or owned by the State in the City of Montgomery, to be done by and through the Department of Finance. This is in accordance with the title of the act relative to managing and servicing said property. "Managing and servicing" as used in the title, in my judgment, is sufficiently broad to include improvement and repair of real property, although not the leasing thereof.

All parts of an opinion rendered to the Administrator of the Alabama Beverage Control Board on May 1, 1937 (Quarterly Report of Attorney General, Vol. VII, p. 87), which are in conflict with the above are hereby superseded by this opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

July 28, 1939.

Hon. J. N. Baker,
State Health Officer,
Capitol.

Health Department—Municipal Corporations not authorized to impose by ordinance additional duties upon County Health Officers.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your letter of June 24, 1939, which reques's my official opinion as follows:

"The Andalusia City Council, in imposing service charges on users of the municipality's sewerage system, by ordinance (copy attached) placed on 'the Sanitary Officer of the City of Andalusia' the duty of notifying delinquents of their failure to pay the charges imposed; and of disconnecting the premises concerned from the sewerage system if owner or owners thereof failed to meet the charges within the time specified in the notice.

"Assuming that the one referred to is the Sanitation Officer of the Covington County Health Department, appointed as provided in Section 1055 of the Code of 1923 (as amended by the 1935 Legislature) and serving under the direction of the County Health Officer, please advise me if the City Council has the right to place on him as a staff member of a service organization (the County Health Department) the responsibilities set forth in the first paragraph of this letter.

"Critical review of the public health laws, particularly Section 1052 (Authority and Jurisdiction of County Boards of Health) and Section 1058 (Duties of County Health Officers)—both as amended by the Legislature of 1935—fails to reveal to me, even by inference, that it is a duty of any member of a County Health Department to serve notice when charges imposed by a municipality for the use of its sewerage system are unpaid; or to disconnect premises from the sewerage system because of the owner's non-payment of service charges.

"In view of the effective date of the ordinance, it is hoped that an early opinion can be had."

It is my opinion that the City of Andalusia does not have the legal authority to require an officer of the Covington County Health Department to perform duties in connection with the collection of charges imposed by said city upon the users of the sewerage system.

I am of the opinion, however, that the City of Andalusia has the authority to maintain a City Sanitation Officer, as I do not believe that the duties of such an officer would conflict with those of the County Health Department, as prescribed by an act approved September 13, 1935, General Acts 1935, page 918.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 2, 1939.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Taxation—Tax Sales—Where certain lands were included in notice of sale only twice instead of three times, as required by statute, the sale of said lands for taxes is invalid.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 27, 1939, in which you request my opinion as follows:

"Judge Joseph N. McAleer called at my office today and stated that The Lyon Company desires to pay whatever taxes may be due on cut-over lands belonging to that Company, and handed me photostatic copies of the three publications of notice of sale for payment of delinquent taxes and costs for the year 1929 by Joseph B. Crow, Tax Collector for Mobile County, appearing in The Mobile Register; and he called to my attention that in the first publication, on Thursday, May 15, 1930, The Lyon Company's assessment was as follows:

" '991 The Lyon Co. All of Hollinger Island County $6,199.13;'

"that in the issue of May 22, 1930 the publication of said notice for sale reads as follows:

" '991 The Lyon Co. All of Hollinger Island County $6,199.13,' and also another assessment

" '991 The Lyon Co.' with the description of a large body of section lands belonging to said Company; and at the end of this published notice of assessment is again added:

" 'and all of Hollinger Island County $6,199.13;'

"that in the third publication of said notice of sale, which appeared in the issue of May 29, 1930, there appeared the following:

" '991 The Lyon Co.' then follows the description of the large body of section lands owned by said Company; and, at the bottom thereof, 'and all of Hollinger Island County, $6,199.13.'

"Judge McAleer contends that there having been only two publications as to the sale of the section lands, being in the second and third publications of the notice, there has not been a proper sale of said lands and the sale held was invalid.

"Hollinger's Island was purchased from the State by The Lyon Company on July 16, 1932, the Company paying the State therefor the sum of $6,728.00; and as to the section lands (cut-over lands) there have been some twenty or thirty redemptions by parties who have purchased portions of these section lands from The Lyon Company; so that the greater portion of the lands sold under said sale are back on the assessment books.

"I would thank you if you would give me an opinion as to the validity of the tax sale of The Lyon Company section lands above referred to, in order that proper steps may then be taken, if you should hold that the sale was invalid, to have the same set aside and the taxes paid; and the property then to be regularly assessed for taxes.

"I am forwarding under separate cover the photostatic copies of the three publications made in The Mobile Register of such intended sale above referred to."

In answer to your inquiry, I am of the opinion that the sale of the Lyon Company section lands in question, under the facts presented, was void.

An examination of the photostatic copies of the newspaper publications, together with the facts set out in your letter, discloses that the description of the section lands in question were included only in the publications of May 22, 1930, and May 29, 1930. These lands were omitted from the publication of May 15, 1930. In other words, these lands were advertised for sale for only two weeks instead of three weeks as was required by law.

At the time of the tax sale in question (1930) the statute then applicable was Section 259 of the 1929 Compilation of the Revenue Laws, which is now Section 224 of the Revenue Act of 1935. Section 259 provides in pertinent part as follows:

"259. (229) (Acts 1919, p. 282, Sec. 250). Sales under decrees; notice of sale.—Immediately at the end of any term of court at which any decree for sales of real estate for the payment of taxes are rendered, or as soon thereafter as practicable, the tax collector shall proceed to enforce such decree by sales of real estate ordered to be sold, and to this end shall give notice for thirty days before the day of sale, by publication for three successive weeks in some newspaper published in the county, or at least three weeks before the day of sale shall post a notice at the courthouse of his county, and at some public place in the precinct in which the real estate is situated, that at the time specified therein, he will proceed to sell such real estate, separately, describing such portions as are embraced in each decree, and stating the amount for which each decree was rendered (without stating the items of which said decree is composed) and the person against whom the taxes embraced in such decree were assessed, or if assessed to 'owner unknown,' stating that fact."

It will be seen from the above that publication for three successive weeks is required. In the instant case there was a publication for only two consecutive weeks in so far as the description of the property in question is concerned.

A substantial compliance with the above statute as regards advertising is essential to the validity of a tax deed. A tax deed is void without proper

advertising and notice as required by statute, and the burden of showing a compliance is on the party claiming under the deed. Statutes governing tax sales are strictly construed. See **Craig v. Swader,** 225 Ala. 366, 143 So. 553; **Hooper v. Bankhead & Bankhead,** 171 So. 626; **McKinnon v. Mixon, 123 Ala. 612, 29 So. 690; Johnson v. Harper,** 107 Ala. 706, 18 So. 198. Cf. **Biennial Report of Attorney General,** 1934-36, page 793.

The premises considered, it is my opinion that the tax sale of the section lands in question was void as there was not a substantial compliance with the advertising statute pertaining thereto. Said properties were included in only two of the publications when three notices were essential.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 2, 1939.

Hon. Wm. J. Kern, Clerk,
Inferior Criminal Court,
Mobile County,
Mobile, Alabama.

Where Highway Patrolman makes an arrest for violation of State traffic laws and the defendant is committed to the County Jail and is afterwards convicted the sheriff would be entitled to guard fees.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of July 10, 1939, in which you request my opinion as follows:

"Please at your earliest convenience enlighten me as to the following:

"An Alabama State Highway Patrol Officer makes an arrest of a person for violating a State Traffic Law; the Defendant pleads guilty and pays a Fine and Costs of Court; is the Sheriff of Mobile County entitled to a Guard Fee of $2.00?"

My answer to your request is in the affirmative if the arrested party was committed to jail. Section 2741, Code of Alabama, 1923, which sets out a schedule for sheriff's fees contains the following:

"For guarding each prisoner lawfully committed to jail in the following cases:

"In all felony cases whether convicted or not $2.00
In all arrests under indictment whether convicted or not $2.00
In all other cases where convictions follow arrests ..... $2.00."

You will note it appears the above fees are contingent upon commitment to jail. I call your attention to the case of **Stone, Treasurer, v. State ex rel Holcombe,** 197 Ala. 293, 72 So. 536.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 2, 1939.

Hon. D. Hardy Riddle,
Judge of Probate,
Talladega County,
Talladega, Alabama.

Exemptions—Act No. 69, H. 202 approved October 7, 1932 (General Acts, Alabama Extra Session 1932 p. 887) granting exemptions from State and county licenses to blind persons, was repealed by Section 368½ of the 1935 Revenue Act.

Blind persons are exempt from the payment of privilege licenses levied under Schedule 146 of the 1935 Revenue Act, as amended by Act No. 230, H. 180, approved March 2, 1937, General Acts, Extra Session, 1936-37, p. 277.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request of July 19, 1939 for official opinion is received. Your request follows:

"Section 3022(2) of the 1936 supplement to Michie's 1928 Code of Alabama provides for the exemption of blind persons, as defined therein, from all state and county licenses to the extent of $25.00 for the state and $25.00 for the county. We have an application for several licenses and claiming the exemptions set up in this section.

"Now this office has been under the impression for several years that there were no exemptions for blind persons from State and County licenses except in certain instances provided for in the license schedules.

"Will you please advise me whether or not the above section is still in force and whether or not blind persons under the existing laws are exempt according to this section. Also please advise me, if exempt, whether exempt on only one license or exempt to the full extent of the amount specified on any number of licenses."

In my opinion as Act No. 69, H. 202. approved October 7, 1932 (General Acts of Alabama Extra Session 1932, p. 887), granting exemption from State

and County licenses to blind persons, was not brought forward in the 1935 Revenue Act, it was repealed by Section 368½ of the 1935 Revenue Act of 1935, which provides as follows:

"Section 368½. The exceptions and exemptions from license or privilege taxes levied by this Act which are granted by this Act, are hereby declared to be exclusive, and any laws or parts of laws general, local or special, granting or attempting to grant any exceptions or exemptions, except as specifically granted herein are specifically repealed."

I refer you to an opinion of this office to Hon. B. L. Malone, Judge of Probate, Morgan County, Decatur, Alabama under date of October 3, 1935, Quarterly Report of Attorney General, Vol. I, page 4, which holds that exemption from State and County licenses granted to war veterans in the 1931 Act was repealed by Section 368½ of the Revenue Act.

I wish to call your attention to the fact that blind persons are exempt from the payment of the privilege licenses levied under Schedule 146 of the 1935 Revenue Act, as amended by Act No. 230, H. 180, approved March 2, 1937, General Acts, Extra Session, 1936-37, page 277, which provides as follows:

"Schedule 146. Each person travelling on an animal or using a vehicle other than a motor vehicle, doing business as a Transient Vendor or Peddler as defined in this Schedule, displaying, selling or offering to sell any goods, wares or merchandise, other than to a merchant for resale, shall pay a privilege license to the State of Alabama of Fifteen Dollars ($15.00) and Five Dollars ($5.00) for the county in each county in which such transient vendor or peddler does business for each vehicle. (b) Each intinerant vendor or peddler of merchandise, other than tobacco products, medicines or household remedies, who operate on foot or use a vehicle solely for the purpose of transporting merchandise from house to house or place to place but who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers to enter said vehicle for the purpose of purchasing merchandise, shall pay an annual license of Twenty Dollars ($20.00) to the State and Ten Dollars ($10.00) to the county in each county in which they do business. This sub-section shall not apply to sales by a licensed merchant in the county in which his store is located. (c) Each person using a motor vehicle, doing business as a transient vendor or peddler as defined in this Schedule displaying, selling or offering to sell any goods, wares or merchandise of whatever nature, at retail shall pay to the State in order to engage in such business the following licenses: Upon one (1) motor vehicle, the annual license for each such motor vehicle, not in excess of one, so used, of—$100.00. Upon two motor vehicles, or more, but not to exceed three, the annual license fee for each such additional motor vehicles shall be—$130.00. Upon more than three motor vehicles, but not to exceed six, the annual license fee for each such additional motor vehicle shall be—$150.00. Upon each motor vehicle in excess of six, for each such additional motor vehicle $200.00. In addition to the above, there is levied a license of—$50.00 for the State and a county license of $50.00 in each additional county in which said business is conducted. Rolling stores which are controlled or held with others by stock ownership of 25% or ultimately controlled or directed by one management or association of ultimate management, shall be deemed for the purpose of this Schedule as being owned by the same person. (d) Each person going from person to person, place to place, or town to town, selling or giving away medi-

cine, salves, ointments, lotions or other goods, wares or merchandise, by exhibitions, shows, performances or other entertainment, whether sold for himself or another, in each county where such sales or gifts are made, shall pay a license of one hundred dollars ($100.00). Definition of Transient Vendor or Peddler: When used in this Schedule, the words 'Transient Vendor or Peddler' shall be held to include any person embraced in any of the following classifications: (a) All persons commonly and generally termed 'Peddlers' and falling within the usual and commonly understood definition of 'Peddler'; or, (b) all persons acting for themselves or as an agent, employee or salesman, or in any capacity for another whether as owner, bailee, or other custodian of goods, wares and merchandise, going from person to person, house to house, or place to place, and selling or offering to sell, or consigning or offering to consign, other than to a retail merchant for re-sale, goods, wares and merchandise; or, (c) all persons who do not keep a regular place of business, open at all times in regular business hours at the same place, going from person to person, house to house, or place to place, or from town to town, and selling or offering for sale, other than to a retail merchant, goods, wares, and merchandise which they carry with them and who deliver the same at the time of or immediately after the sale; or, (d) all persons who go from person to person, house to house, place to place, soliciting orders, other than from a retail merchant for re-sale, by exhibiting samples, or taking orders and thereafter making delivery of the goods or filling the order, without carrying or sending the order to the permanent place of business. This Schedule shall not apply to a person or to any number of his immediately household, selling or offering to sell dairy, poultry, or farm products raised, produced or grown by himself, or the immediate members of his household, or such products preserved, bottled, or canned by himself, or the immediate members of his household, or to persons peddling wood, charcoal, fruit or vegetables; **or to blind persons or persons physically disabled to the extent of thirty per cent (30%), such disability to be certified to by a reputable physician and the local license inspector,** operating other than a rolling store, or to peddlers of poultry and eggs, or to persons selling fish, shrimp, crabs or to other sea foods. These and none other shall be exempt from the payment of the license tax levied by this Schedule. The payment of the privilege license required by this Schedule shall not authorize any transent vendor or peddler to sell any goods, wares or merchandise for which a higher or specific license is required without the payment of such license in addition to the license herein levied, or to sell any goods, wares or merchandise that are by law required to be sold at a fixed location, except upon the payment of the maximum license levied under the Schedule or Schedules of this chapter for the sale of merchandise at a fixed location."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 2, 1939.

Hon. Chris J. Sherlock,
State Highway Director,
State Capitol.

Insurance Contractors—

Premium on contract of insurance covering employees of Hardaway Contracting Company on State Project FAP Florence Bridge, must be based upon the entire remuneration earned, during the Policy Period, by all employees of said company who were covered by said policy while on said project. The entire remuneration earned included sums paid firemen and launchmen for back time.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request of March 30, 1939, for official opinion as follows:

"Re: FAP 108 Florence Bridge.

"The labor provisions in the contract of Hardaway Contracting Company on the above captioned project provided a rate of pay for firemen and launchmen, at sixty cents per hour. The contractor paid these rates and later the Highway Commission established a rate for these grades of labor at seventy five cents per hour and made it retroactive to beginning of the contract with provision for reimbursement to the contractor for the extra expense. Certain sums were, therefore, paid to the workmen for back time.

"Please advise if the contractor can be required to pay Insurance on his payrolls covering the back time. If this insurance premium is paid the State will have to reimburse the contractor, and it appears to us that no protection is afforded for the premium paid."

After a consideration of the contract of insurance furnished us on July 22, 1939, together with the facts set forth in your letter of March 30, 1939, I am of the opinion that your inquiry should be answered in the affirmative.

The contract of insurance covering the employees of the Hardaway Contracting Company on State project FAP Florence Bridge provides in substance that the premium to be paid for said insurance is based upon the entire remuneration earned, during the Policy Period, by all employees of said company who were covered by said policy while engaged on said project. This provision is found in Section "A" under the title "Subject To The Following Conditions" as it appears in said policy. The pertinent part of said provision is as follows:

"A. The premium is based upon the entire remuneration earned, during the Policy Period, by all employees of this Employer engaged in the business operations described in said Declarations together with all operations, necessary, incident or appurtenant thereto or connected there-

with whether conducted at such work places or elsewhere in connection therewith or in relation thereto; excepting, however, the remuneration of the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation, but including the remuneration of any one or more of such designated officers who are actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman. * * *"

As heretofore noted, the contract of insurance specifically provides the method of computing the premium to be paid for said coverage. The conditions contained in said policy of insurance are binding upon the parties thereto, and therefore it is our opinion that the premium due said insurance company should be computed on the entire remuneration earned, during the Policy Period, by all employees of the Hardaway Contracting Company who were covered by said policy while engaged on said state project. The entire remuneration earned by said employees would include the sums paid firemen and launchmen for back time.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 3, 1939.

Hon. S. W. Hawkins, Chairman,
Jefferson County Board of Registrars,
102 Court House,
Birmingham, Alabama.

1. County governing body of Jefferson County must allow Chairman of Board of Registrars, out of county funds, reasonable expenses for suitable books, stationery, postage stamps used exclusively for official business, and telephone necessary in the performance of the duties, etc. in regard to registration of voters, which are ordinarily performed by the Judge of Probate but which, by Section 403 of Michie's Alabama Code of 1928, are placed upon the Chairman of the Board of Registrars in counties of a certain population classification, in which Jefferson County is the only county.

2. The duties placed upon county governing bodies by the provisions of Section 425-436 of Michie's Alabama Code of 1928, have not been transferred from them in Jefferson County, but are still upon the governing body of said county, and the expenses incurred in the performance of said duties must be paid as other expenses of the county are paid.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of May 24, 1939, which is as follows:

"As Chairman of the Board of Registrars of Jefferson County I desire to request your opinion construing the Acts of 1922, p. 124, paragraph 327, Acts of 1927, pp. 277 and 278, Code 1928 Section 403, pertaining to the Board of Registrars of Jefferson County. Under this section the duties, power and authority given to and required of the Judge of Probate by Article 3 of Chapter 19 of the Code of Alabama and acts amendatory of any section thereof shall be conferred upon, done and performed by the Chairman of the Board of Registrars. In another part of the Act, it is the duty of the Board of Revenue to furnish an office at the Court House for the Chairman of the Board of Registrars.

"As Chairman of the Board of Registrars, I have made certain requisitions on the County for office supplies, other than those supplies provided for by the State in sections 386, 396 and 397 of the Code of Alabama, and the County Commission has denied the requisitions, saying that all supplies for my office should be furnished by the State and not from the County. I would like to know, since certain duties of the Probate Judge have been conferred upon my office, whether the County must furnish me any and all supplies that are necessary to the running of the office other than the registration books, forms and blanks furnished by the Secretary of State.

"Under section 425 through 436 of the Code of Alabama there are certain duties prescribed for the County Commissioners or Boards of Revenue with reference to the dividing of election precincts and the changing of election precincts. The County Commission of Jefferson County, by resolution adopted October 18, 1938, recommended changing the boundary lines of the several precincts so as to coincide with the boundary lines of the Bessemer Cut Off, and referred the recommendation and action to the Chairman of the Board of Registrars of Jefferson County. In checking this work it is necessary that certain office supplies be furnished in the way of stationery, cards, and writing material, and as Chairman of the Board of Registrars I made requisition on the County for 5000 cards to be used in doing this work. The requisition was returned to me, stating that supplies for my office should be furnished by the State and not from the County. Please advise me whether or not, in and about dividing election precincts, changing of boundary lines in the precincts, and changing of districts to comply with the law, the County or State is liable for supplies and expenses incurred.

"The thought occurs that since certain duties of the Probate Judge were conferred upon the Chairman of the Board of Registrars, then the County should pay for all expenses incurred outside of the specific matters furnished by the State. Section 9604 of the Code, Local Laws of 1923, page 99, provides that the Judge of Probate, etc., must be allowed expenses for suitable books, stationery, postage stamps, etc., used exclusively for office work and to be paid for by the County on the approval of the Board of County Commissioners, and section 496 of the Code provides that the Judge of Probate for each County shall have printed at the expense of the county, ballots, blank poll lists, certificates of results, oaths, and any other stationery or blank forms necessary in the conduct of election. Since all of the work being done by the Chairman of the Board of Registrars comes under the election code, and all of the work indirectly affects elections and is of a local nature, it would seem that the County would be liable for the expense.

"My office keeps a complete index card system of any and all persons that have ever registered in the County, complete filing system of all correspondence, large bound volumes of those that have registered, and it is absolutely necessary to have office supplies to run the office in a proper and efficient manner. As Chairman of the Board of Registrars of Jefferson County I receive many, many letters seeking information about parties registered and from parties who have moved from Jefferson County to other Counties in the State or out of the State, and unless I am furnished with stationery and other supplies I can not properly attend to these matters. The Board does not meet except a certain number of days in the year, but I am on duty all of the year round and certainly since certain duties have been taken away from the Probate Judge and conferred upon me as Chairman of the Board of Registrars I feel that I am acting in his stead when attending to these matters and should be allowed office supplies in and about attending to my duties."

It is my opinion that the county governing body of Jefferson County must allow the Chairman of the Board of Registrars, out of county funds, reasonable expenses for suitable books, stationery, postage stamps used exclusively for official business, and telephone necessary in the performance of the duties, etc., in regard to registration of voters which are ordinarily performed by the Judge of Probate, but which, by Section 403 of Michie's Alabama Code of 1928, have been placed upon the Chairman of the Board of Registrars in counties of a certain population classification, in which Jefferson County is the only county.

In Article 3 of Chapter 19, Sections 370-403 of Michie's Alabama Code of 1928, various provisions concerning registration of voters, Boards of Registrars, etc., are found. The only provisions made therein for supplies to be furnished by the State are Sections 386, 396, and 397, which are as follows:

"Section 386. Registration books, forms and blanks furnished by secretary of state.—The secretary of state shall, at the expense of the state, have prepared and furnished to the registrars and judges of probate in the several counties a sufficient number of registration books and blank forms of oath, certificates of registration and of notices required to be given by registrars. The cost of the publication of the notices required to be given by the registrars shall be paid by the state, the bills therefor to be rendered to the secretary of the state and approved by him."

"Section 396. Books kept as to names stricken from list.—The board of registrars shall enter on a book to be furnished by the secretary of state, for that purpose, the names in alphabetical order by precincts of all electors stricken from the registration list, and after each meeting for purging the registration list shall file the same in the office of the judge of probate. On the filing of said book the judge of probate shall strike all such names from the list in his office and shall not again send them out to the inspectors."

"Section 397. Books of registrars.—The board of registrars shall be furnished by the secretary of state, at the expense of the state, necessary books for the registration of the electors so arranged that the news of the electors registered may be conveniently entered in said books in alphabetical order."

Reasonable expenses for suitable books, stationery, postage stamps used exclusively for official business, and telephone necessary in the performance of the duties, etc., which are ordinarily performed by the Judge of Probate pursuant to the provisions of Article 3 of Chapter 19, supra, must be allowed by the county governing body, out of county funds, in accordance with Section 9604 of Michie's Alabama Code of 1928, and Act No. 192, Local Acts 1923, page 99, approved August 27, 1923, applicable only to Jefferson County.

However, Section 403 of Michie's Alabama Code of 1928 provides a different set-up for counties having a population of more than 150,000. Section 403 is as follows:

"Section 403. Salary or compensation of board of registrars.—The chairman of the board of registrars in counties having a population of more than one hundred and fifty thousand, according to the last or any succeeding federal census, shall be furnished an office at the court house in such counties by the board of revenue, or board of like jurisdiction. In such counties where there is more than one court house, the board of revenue or board of like jurisdiction, shall determine at which court house the office of the Chairman of the board of registrars shall be located. The chairman of the board of registrars shall have the power and authority to employ a chief clerk and such other clerical help as may be necessary for the efficient discharge of the duties of his office. The chief clerk shall be paid the same salary, in the same manner, as is paid to the other chief clerks in the several departments of the county as fixed by the board of revenue, or board of like jurisdiction. The salaries of the said chief clerk and other clerical assistants shall be fixed by the board of revenue, or board of like jurisdiction. The chairman of the board of registrars shall receive a salary of three thousand dollars per annum, to be paid in twelve monthly payments, out of the funds of the county treasury, in the same manner as other officers are paid. For each working day spent by the chairman of the board of registrars for the purpose of registering voters, the State shall pay the amount paid to the other registrars, said amount being in addition to the salary hereinbefore stated, and in all such counties the duties, powers and authority given to and required of the judges of probate by article 3 of chapter 19 of the Code of Alabama, and acts amendatory of any sections thereof, shall be conferred, done and performed by the chairman of the board of registrars."

This section provides that in the counties coming within its scope (Jefferson County only), the Chairman of the Board of Registrars shall have and exercise the duties, etc., placed upon the Judge of Probate by Article 3 of Chapter 19 of Michie's Alabama Code of 1928. There is no provision therein from which it might even be inferred that the State will furnish any supplies other than those specifically enumerated in the sections of the Code first hereinabove quoted. The Chairman of the Board of Registrars of Jefferson County is charged with the performance of the duties, etc., that in other counties are placed upon the Judge of Probate, and, consequently, in my opinion, he must be allowed the same reasonable expenses, etc., necessary in the performance of these duties, as are allowed when the duties are performed by the Judge of Probate.

Sections 425-436 of Michie's Alabama Code of 1928 relate to precincts, voting places and boxes. Section 427 specifically places the duty of dividing election precincts into districts upon the county governing body. This duty

is not transferred to the Chairman of the Board of Registrars of Jefferson County by Section 403, supra (Sections 425-436, supra, are not part of Article 3 of Chapter 19 of Michie's Alabama Code of 1928), nor is it transferred to him by the provisions of any other act of which we are aware. Therefore, this duty is still vested in the county governing body of Jefferson County and should be exercised by it, and the expenses incurred in performing this duty should be paid just as the other expenses of the county governing body are paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 4, 1939.

Hon. A. H. Collins,
Superintendent of Education,
Montgomery, Alabama.

Foreign corporations—

1. A foreign corporation does not have to qualify under the laws of the State of Alabama to do business in this State before bidding on equipment for a dormitory building at the Florence State Teachers College under a P. W. A. contract.

2. Such corporation must qualify under the laws of the State of Alabama to do business in this State before carrying out the provisions of any contract that might be awarded to it as a result of such bid.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of July 10, 1939, in which you request my opinion as follows:

"On Thursday, July 6, bids were opened in my office for the purchase of equipment for a Dormitory Building at the Florence State Teachers College under a PWA contract. Tuttle & Bailey, a foreign corporation, was low bidder on Group D of the equipment mentioned above. It developed later, however, that this company had not qualified with the Secretary of State to transact business in Alabama.

"You will note from copies of the letters which I am enclosing that this company is now in the process of qualifying with the Secretary of State and the Tax Commission for legally transacting business in Alabama. Please let me have your opinion as to whether or not it would be legal to grant to this company contract for the equipment of this building when it had not qualified prior to the date of opening the bids."

As you no doubt know, persons, firms or corporations bidding on public improvements in this State must first comply with the provisions of Act No. 540 (General Acts 1935, p. 1146) approved September 14, 1935. In Section 8 of said act we find the following proviso:

"Where the applicant is a foreign corporation, the application shall be accompanied by a certificate of the Secretary of State that such corporation is authorized to do business in this state."

However, in the same section we find this further proviso:

"This act shall not apply to the purchase of material, equipment or supplies."

Since the bid made by the foreign corporation referred to in your letter of inquiry was on equipment, the provisions of the above-cited act would not apply thereto.

The question then recurs as to whether or not a foreign corporation submitting a bid is doing business within this State in such a manner as to require it to first qualify to do business in this State under the laws in regard thereto. See Sections 7204-7220 of the Code of Alabama, 1923, and Sections 309-336 of the 1935 Revenue Act. This question has been answered in the negative by an opinion of this office addressed to Hon. Howell Turner, Secretary of State, Capitol, under date of March 7, 1935, Office Edition, Vol. 3-A, page 1, a copy of which opinion is enclosed herewith for your information. In that opinion, we held that a foreign corporation need not qualify to do business in this State in order to submit bids for furnishing textbooks to the public schools of Alabama. For the same reasons, and on the basis of the same authorities cited in said opinion, we advise you that a foreign corporation need not qualify to do business in this State before submitting a bid for furnishing equipment for a dormitory building at the Florence State Teachers College under a P. W. A. contract.

Of course, if this foreign corporation is the successful bidder and the contract is awarded to it, it must first comply with the laws of the State of Alabama, cited, supra, in regard to qualifying to do business in this State before carrying out the terms of the contract.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 4, 1939.

Hon. William H. Ivey, Chief,
Division of Labor,
Department of Industrial Relations,
Montgomery, Alabama.

Workmen's Compensation Act—Settlements under Sections 7550 and 7551, as amended, to be valid and binding have to be approved

by the court and judgments rendered thereupon. When settlements have not been approved by the court, employees may disregard the same and proceed under Section 7578 of the 1923 Code of Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion of July 12, 1939, as follows:

"We wish to call your attention to Section 7550 of the Code of Alabama of 1923 and Section 7551 as amended by the General Acts of Alabama, 1935.

"In view of the fact that our Workmen's Compensation Law has been termed a court administered law, the question has been raised as to the legality of settlement which has not been approved by the court.

"A number of settlements have been made between the interested parties when the amount or benefit of the settlement was not substantially the same as stipulated in Section 7551 of the Code as amended by the General Acts of 1935. Is it possible to require the interested parties to a settlement to make an adjustment in the amount of the settlement to conform with substantially the same amount as stipulated in this section; and to whom is the authority granted for requiring such an adjustment?"

In my opinion, settlements under Section 7550 of the 1923 Code of Alabama and Section 7551, as amended by Act No. 387, H. B. 496, approved September 9, 1935 (General Acts, 1935, page 831), to be binding have to be approved by the court and judgments rendered thereupon.

In the case of **Central Iron & Coal Co. v. Pennington,** 209 Ala. 22, 95 So. 472, Justice Thomas, speaking for the court relative to settlements under Section 12(b) of the Workmen's Compensation Act, which section was brought forward as Section 7550 of the 1923 Code of Alabama, said:

"The settlement between the parties contemplated by the statute to be binding must be approved by the court and judgment rendered thereupon as provided by the statute."

See also **Davis v. Birmingham-Trussville Iron Co.,** 223 Ala. 259, 135 So. 455.

In other jurisdictions, settlements have to be approved by the Compensation Boards.

In the case of **Huckabee v. Black Mountain Corporation,** 24 S. W. (2) 299, the Court of Appeals of Kentucky said:

"It is well settled that an employer coming within the terms of the Workmen's Compensation Act cannot relieve himself wholly of liability thereunder by a contract. Neither can he relieve himself in part, except

with the approval of the board. This law becomes a constituent and controlling part of any agreement made respecting compensation for injuries received. When it has been approved by the board, the agreement in effect becomes its award. Sawyers v. Lena Rye Coal Co., 217 Ky. 500, 289 S. W. 1107; Hatfield v. Billiter & Wiley, 231 Ky. 736, 22 S. W. (2d) 129. When it has not been so approved, such settlement may be ignored, or, rather, considered as an agreement to voluntarily pay the sums stated, as it provided by sections 4914 and 4931 of the Statutes. The board may proceed to a hearing of the application for compensation the same as if there had been no such agreement, except that credit should be given for any amounts paid under that agreement."

The proposed settlements without the approval of the court and judgment thereupon do not bind the parties involved and the employees may proceed as in the case of disputed claims and file a verified complaint in the Circuit Court, as provided by Section 7578 of the 1923 Code of Alabama.

The amounts already paid to the employees under the proposed settlements should be treated as moneys voluntarily paid by the employer or insurance carrier and credited as advanced payments on account of the compensation due.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 4, 1939.

Hon. Frank N. Julian,
Superintendent of Insurance,
Department of Commerce,
Capitol.

Corporations—A mere change in name of a corporation does not affect its rights, or lessen or add to its obligations; and does not render such corporation liable for new licenses.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 11, 1939, in which you request my opinion as follows:

"The Halifax Fire Insurance Company is duly licensed for business in this state and advises this Department that by duly authentic amendments to the charter of the company the name has been changed from Halifax Fire Insurance Company to the Halifax Insurance Company. There will be no change in the company's financial status and no change in the business it will transact.

"Will you advise us, therefore, whether or not the change in the name of the company (merely by eliminating the word 'Fire') would make this company liable for a new license."

I am of the opinion that your inquiry should be answered in the negative.

It appears that the corporation in question merely changed its corporate name and did not change its financial status or business activities. A change in a corporate name has no more effect upon the corporation's identity than a change of name by a natural person has upon his identity; nor does it affect its rights, or lessen or add to its obligation.—**North Birmingham Lumber Co. v. Sims & White** 157 Ala. 595, 8 So. 84. Therefore said corporation is not liable for a new license.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 5, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

1. If the Federal Court assumes jurisdiction over a condemnation case growing out of the violation of the prohibition laws, such court can carry the case on to a final disposition.

2. It is the duty of an officer of the state seizing property used in transporting prohibited liquors to follow the mandate of Section 4778, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of June 10, 1939, in which you request my opinion as follows:

"I am incorporating below a letter from an Assistant Examiner of Accounts, which is self-explanatory:

" 'In the course of examining the office of the Circuit Clerk in the Bessemer division of Jefferson County, Alabama, it was noted that the Sheriff's office was apprehending cars for transporting whiskey in violation of State laws and the arresting officers were turning the automobiles and violators over to the Federal Government for prosecution and condemnation of the seized whiskey and automobiles. In the instances referred to Deputy Sheriffs are making the arrest and seizure, without being accompanied by a Federal agent or officer.

"Please advise me as to the legality of this procedure, as it appears that the State and County are losing considerable revenue by this practice as well as being contrary to law.'

"Will you please give me a ruling on the above?"

The court, whether it be Federal or State, does not assume jurisdiction of such cases until a petition is filed in court seeking condemnation, and the fact that the seizure is made by a State and not a Federal officer, of course, does not in any way relieve the conveyance from the operation of the law. If the Federal Court gains jurisdiction of the subject matter by petition, it has the right to carry the case on to its final conclusion. However, it is the **duty** of the sheriff or other arresting officer or any other person acting under authority of law in the enforcement of the prohibition laws of the State to follow the plain mandate of Section 4778, Michie's Code of Alabama, 1928, which is as follows:

"Section 4778. Conveyances and vehicles transporting prohibited liquors or beverages; animals, harness or accessories in transportation thereof.—All conveyances and vehicles of transportation of any kind, whether on the waters of the state, under the waters, on land, or in the air, which have been or are used for the illegal conveying of any prohibited liquors, or beverages into this state, or from one point in the state to another point within the state, including any animals that may be used in such transportation, whether hitched or not hitched to any vehicle so illegally used, together with all harness and other accessories employed in such illegal transportation, shall be contraband and shall be forfeited to the state of Alabama, and shall be seized by any sheriff or other arresting officer, or any other person acting under authority of law in the enforcement of the prohibition laws of the state, who becomes cognizant of the facts, or who finds liquor being illegally transported as aforesaid in such conveyance or vehicle or on any such animal. And such officer or person shall report the seizure and the facts connected therewith to the solicitor or any prosecuting official in the county where seizure is made, or, in default thereof, to the attorney-general of the state. And, in order to condemn and confiscate any of the above mentioned vehicles or animals, it shall not be necessary for the state to show any actual movement of said vehicles or animals while loaded with any of said prohibited liquors or beverages.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 5, 1939.

Hon. Henry W. Smith,
Sheriff, Etowah County,
Gadsden, Alabama.

1. Sheriffs—Juveniles—

Cost of feeding juveniles is to be paid by the county. The method of payment is governed by the provisions of Section 3529, Code of 1923, as amended.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated May 13, 1939, which is as follows:

"Please give me your official opinion on the following question, which is based on the opinion given by Assistant Attorney General Kohn to Hon. J. P. Williams, Sheriff of Barbour County, Clayton, Alabama, July 20, 1936, as follows: 'The Sheriff should be paid the same per diem for feeding juveniles as he is paid for feeding prisoners.'

"As you know the Sheriff is paid his allowance on a sliding scale for the first twenty prisoners and a fixed scale on all above that number; hence this question:

"Should the Sheriff use the sliding scale for the first twenty prisoners in making his charge to the County in addition to the cost of food per day, or should he charge a fixed amount for juveniles?"

The opinions of this office are somewhat confused as to whether or not the State or the county pays for the feeding of juveniles held in jail under orders of a juvenile court, and also as to whether or not the sheriff should collect for feeding such juveniles in the same manner as if they were "prisoners" committed by a circuit court or court of concurrent jurisdiction.

The answer to this question is not an easy one. There are two provisions of law which should be considered in arriving at the solution to the question. Both of these sections are contained in Chapter 100 of the Code of Alabama, which chapter relates to "Children, Juvenile, Delinquents." I refer specifically to Sections 3529 and 3558.

The pertinent part of Section 3529, as amended, is as follows:

"All expenses necessary or appropriate to the carrying out of the purposes and intent of this chapter and all expenses for the maintenance and care of children that may be incurred by order of the court in carrying out the provisions and intent of this chapter, shall be valid charges and preferred claims against the county, and shall be paid by the county treasury when itemized and sworn to by the creditor or other persons knowing the facts in the case, and approved by the judge."

Section 3558, supra, is as follows:

"Section 3558. Officer serving process, etc., under juvenile courts; costs and fees of.—All officers serving process from juvenile courts, or feeding prisoners committed by, or held for or under such courts, shall receive the same costs, fees, and compensation payable in the same manner and from the same source as are now allowed and paid for like services with respect to process issued by the circuit courts or courts of like jurisdiction, and for feeding prisoners committed by circuit courts or courts of like jurisdiction."

In an opinion rendered on May 18, 1928, Biennial Report of Attorney General, 1926-28, page 540, these sections were considered and this office held

that the expense of feeding juveniles should be charged against the county. I also call your attention to an opinion rendered to the Sheriff of Lee County on November 20, 1931, Biennial Report of Attorney General, 1930-32, page 571, in which these sections are again considered and a field of operation given to both of them. It was held therein that Section 3529 was the provision of law under which sheriffs should be paid for the feeding of juvenile delinquents. It was further held that persons charged with non-support are "prisoners", for the feeding of which the State was liable. This is the field of operation for Section 3558, supra.

It is my opinion that juvenile delinquents committed to jail by the juvenile courts of this state are not "prisoners" within the meaning of that word as used in Section 3558, and that the several counties of the state are liable to their respective sheriffs for the feeding of such delinquents, as provided for in Section 3529, as amended.

This office, in an opinion rendered to the Sheriff of Barbour County on July 20, 1936, (Biennial Report of Attorney General, 1934-36, page 737) held that even though the county is liable for the feeding of such juvenile delinquents, that the sheriff should be paid for them on the same basis as he is paid by the state for feeding prisoners committed by Circuit courts or courts of like jurisdiction (Biennial Report of Attorney General, 1934-36, page 737).

I do not agree with the holding of this opinion. If Section 3558 is authority for the manner of payment of sheriffs for feeding juvenile delinquents, it would necessarily require that the state pay for the feeding of such juvenile delinquents.

I am of the opinion that a sheriff of a county must present a claim to the Court of County Commissioners to be audited and allowed by them for the necessary and appropriate expenses incurred by him for the feeding of juvenile delinquents committed to jail. It is my opinion that when the Court of County Commissioners has found that such claims are based on the necessary expenses incurred by the sheriff, that the allowance by them of such claims is in all respects proper and legal.

The part of the opinion rendered to the Sheriff of Barbour County, above referred to, wherein it is held that the sheriff is paid for the feeding of juvenile delinquents in the same manner as he is paid for the feeding of prisoners, is hereby expressly overruled.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 5, 1939.

Hon. Watkins M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

County—Not authorized to furnish sheriff with motor boat.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of July 8, 1939, in which you request my opinion as follows:

> "The Sheriff of Dallas County has made application to the Court of County Revenues of Dallas County to furnish him with a motor boat for use in scouting along the Alabama River looking for whatever he may find in the way of lawbreaking. The Board takes the position that it has no authority to make such purchase. However, I would thank you to give me your opinion on the subject. A former Attorney General held we were without authority to purchase a bloodhound and I can see no more reason for purchasing a boat."

It is my opinion that there is no authority for the county governing body to furnish the Sheriff with a motor boat. The county governing body is a creature of the statute and can exercise only those powers expressly conferred upon it. I find no authority in Section 6755 of the 1923 Code of Alabama, Local Acts of 1931, page 15 (applicable only to Dallas County), nor in any other section or act whereby the county governing body can furnish a sheriff with a motor boat.

This office has previously held that the county governing body has no authority to furnish the sheriff with handcuffs, pistols, etc. Opinion rendered to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, on February 25, 1927, reported in Biennial Report of Attorney General, 1926-28, page 127; also opinion rendered to Hon. Sam J. Sanders, County Treasurer, Fayette County, Fayette, Alabama, reported in Biennial Report of Attorney General, 1926-28, page 492. Neither can the county governing body furnish the sheriff with bloodhounds. Opinion rendered to the Chief Examiner of Accounts on May 16, 1929, reported in Biennial Report of Attorney General 1928-30, page 375; nor with motorcycles, opinion rendered to Hon. G. H. Howard, Probate Judge, Elmore County, Wetumpka, Alabama, on September 10, 1924, Biennial Report of Attorney General 1922-24, page 453.

Therefore, it is my opinion that such an expenditure is not authorized.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 7, 1939.

Hon. A. M. McConnell,
Judge of Probate,
Limestone County,
Athens, Alabama.

Insane—Guardian—

Necessary that lunacy proceedings be held before guardian appointed for insane person, under facts stated.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of July 22, 1939, in which you request my opinion as follows:

> "I have a proposition of a guardian for an adult person before me. There has been no inquisition by a jury declaring this person a non compos mentis; he is a veteran and is at this time confined in the hospital at Gulfport, Mississippi. He has some estate and it is necessary for a guardian to be appointed. His estate wanted to get out of the expense of having an inquisition if a guardian could be appointed under the 1931 Acts of the Legislature, page 281.
>
> "It is not necessary for a guardian to be appointed so far as the Veterans Administration is concerned. What I want to know is whether or not I would have authority to appoint a general guardian for this non compos mentis under the above referred to Section when the guardian will take charge of the estate of this non compos mentis, and the estate has not come from the Veterans Administration.
>
> "It is important that I know about this matter right away and I shall appreciate it if you will advise me promptly in regard to same."

It is my opinion that the facts presented in your inquiry do not justify the appointment of a guardian for an adult insane person under authority of Act No. 240, approved June 6, 1939, (General Acts 1931, page 280). The act above referred to relates to the appointment of guardians for persons coming within the Uniform Veterans Guardianship Act. In Section 1 thereof it is stated, "**Estate and income** shall include only moneys received by the guardian from the Bureau and all earnings, interest and profits derived therefrom. The term 'benefits' shall mean all moneys payable by the United States through the Bureau," (Emphasis supplied.) As stated in Section 17 thereof, "this article * * * shall apply only to the beneficiaries of the Bureau." Therefore, I am of the opinion that the provisions set out under the Uniform Veterans Guardianship Act cannot be substituted for the inquisition proceedings set out in Article II of Chapter 299 of the Code of Alabama of 1923, which deals generally with the appointment of guardians for persons of unsound mind.

The case of **Fowler v. Nash,** 225 Ala. 613, 144 So. 831, stands for the proposition that a probate court's authority to appoint a guardian must be exercised only as prescribed by statute. When speaking of a probate judge's authority to appoint a guardian for insane persons, the court stated:

> "The limitation fixed by statute upon the authority of courts of probate in the appointment of a guardian of a person of unsound mind is that such an appointment must not be made until an inquisition has been had and taken as directed by statute."

See also the case of **Fowler v. Fowler,** 219 Ala. 453, 122 So. 44, where substantially the same rule is set out.

In view of the fact that the estate of the insane person whose guardian you are to appoint is separate and distinct from that coming from the

Veterans Administration, it is my opinion that you must conform specifically to the provisions of Chapter 299 of the Code of Alabama of 1923.

This opinion is not in conflict with an opinion rendered by this office to the Probate Judge of Etowah County, on October 27, 1932 (Biennial Report of Attorney General, 1930-32, page 23), which opinion dealt with a case where the estate was composed only of benefits received from the United States Veterans Bureau.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 9, 1939.

Hon. T. R. Snead,
Judge of Probate,
Cherokee County,
Centre, Alabama.

Constitutional Amendments Election of July 11, 1939—Expenses of holding same—Publication of lists of election officials—

1. The expenses of holding the Constitutional Amendments Election of July 11, 1939, including publication of notice thereof, are to be borne by the State.

2. No authority for Sheriff to publish notice of Constitutional Amendments Election.

3. Under Code Section 438 of the 1923 Code, list of election officials are to be published only once.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated July 15, 1939, which follows:

"The Cherokee County Herald, a weekly newspaper published in Cherokee County, has rendered a bill against the County for publishing the notice of the Amendment election and has charged for four publications for four weeks at the rate of 4½c per word. He has also rendered a bill for publishing the list of election officers for the Amendment election which was carried for three weeks and charged the rate of 3½c per word.

"Please advise me if we can pay for four publications of the notice of election and three publications of the list of officers for the election. Your prompt reply will be appreciated."

In reply to my request for additional information in regard to the notice of election referred to in the above request, I am advised by you by letter under date of July 24, 1939, that the notice of election referred to in your request was the notice of election required to be given by the Sheriff under the provisions of Section 447 of the 1923 Code.

In this regard, I call your attention to an advisory opinion rendered by the Justices of the Supreme Court to Hon. Frank M. Dixon, Governor of Alabama, under date of June 9, 1939, in which opinion the Justices ruled that Sections 447 and 533 of the Code of 1923, which sections require Sheriffs to give notice of certain elections, are not applicable to proposed amendments to the Constitution. This opinion further holds that the notices required to be given by the Governor pursuant to Section 284 of the Constitution of 1901, as amended, and the acts proposing such amendments govern in such matters, and that the Sheriffs of the respective counties of the State shall not be required to publish any additional notice of the proposed Constitutional Amendments Election.

It is my opinion that since the Justices of the Supreme Court have ruled in the advisory opinion referred to above that Code Sections 447 and 533, supra, have no application to Constitutional Amendments Elections, there is no authority for you, as Probate Judge, to pay the advertising bill for the publication of the election notice referred to in your request.

In regard to the payment of the bill rendered for the publication of the list of election officials, I advise you that due to the fact that under the provisions of the respective acts calling the election, the expenses of the election are to be defrayed by the State, you, as Probate Judge, may pay this bill, and if paid, your county is entitled to be reimbursed by the State for this item.

However, I call your attention to Section 438 of the Code of 1923, which provides that the list of election officials must be published only once, and there is no authority to publish such lists for three consecutive weeks. If you determine to pay this bill, and later be reimbursed by the State, you will be authorized under the provisions of Section 9262 of the Code of 1923 to pay at the rate of 1½c per word for one insertion and not 3½c per word as stated in your request.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 12, 1939.

Hon. R. T. Simpson, Jr.,
Circuit Solicitor,
Florence, Alabama.

1. Resident of Alabama cannot legally operate tag of another state on the public roads of Alabama.

2. Non-resident operating automobile for commercial purposes (not for hire) in the State of Alabama under Schedule 158.15 of the

Revenue Laws of 1935, as amended, and leaving State before period of thirty days from date of entry required to secure permit under Schedule 158.15 of Revenue Laws, as amended.

3. Resident of Tennessee may operate automobile in Alabama subject to conditions of 1938 reciprocal agreement.

4. Justice of the Peace jurisdiction over violations of Revenue Laws discussed.

5. Motor vehicles. Prosecutions for evasions of license tag tax properly brought under Section 352(a) and Schedule 158.15 of the Revenue Laws.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 15, 1939, in which you request my opinion as follows:

"The attached letter from Honorable Paule M. Chambers, License Inspector for Lauderdale and Colbert Counties asking me for an opinion for his guidance is self explanatory. Inasmuch as only an opinion from you protects him in the transaction of the State's business, I am forwarding the same to you with my request that you let me have an answer to his inquiry at your earliest convenience."

Your letter enclosed an inquiry from the License Inspector of Lauderdale and Colbert Counties requesting information on the following points:

"1. Is an automobile of a resident of Alabama, which is being used in personal business and not exclusively for family use, subject to the license tag law of Alabama or is such automobile exempt from such law when it carries a tag of another State, purchased by the owner while still a resident of Alabama?

"2. Is a private automobile owned by a resident of Tennessee subject to the license tag law of Alabama when being used in the State of Alabama commercially or for gainful purposes (not for hire) whether used by owner or not, although it returns to the State of Tennessee in periods less than 30 days?

"3. Does a Justice of Peace have final jurisdiction in cases denounced by Section 352(a) page 558, General Acts of Alabama, Regular Session 1935?

"4. Do you construe the last clause in Schedule 158.16, General Acts of Alabama, 1935, page 527, to mean that Justices of Peace have final jurisdiction in the cases of violations of the license tag law?

"5. Do the Justices of Peace have final jurisdiction in cases of the violation of the license tag law?

"6. There is a prevalent practice here of residents of Alabama purchasing their tags in Tennessee for the purpose of evading the high license tag tax of Alabama. Please advise me what section of the law prosecutions of this nature should be brought under?"

Answering your first inquiry, I refer you to an opinion rendered under date of November 28, 1931, to Hon. H. W. Owens, Judge of Probate, Henry County (Biennial Report of Attorney General, 1930-32, page 586) in which it was held that a resident of Alabama cannot legally operate the tag of another state upon the public roads of Alabama.

In answer to your inquiry number two, I call your attention to an opinion rendered under date of April 3, 1936, to Hon. E. C. Whelan, License Inspector, Jefferson County (Quarterly Report of Attorney General, Vol. III, p. 13) wherein it was held that a non-resident operating an automobile or truck (not for hire) in the State of Alabama under Schedule 158.15 of the Revenue Laws of 1935, on October 1, 1935, and leaving the State before the period of thirty days from date of entering was not required to purchase the Alabama tag in returning to the State thirty days later. Schedule 158.15 was amended by the Legislature in the 1936 Extra Session (General Acts, Extra Session, 1936, page 208) to require a non-resident using a motor vehicle in Alabama for commercial purposes to secure a permit from the Probate Judge of the first county in this State which he enters. The pertinent provisions of Schedule 158.15 are as follows:

"Provided, further, that motor vehicles of non-residents used for commercial purposes and making not more than two trips per month, each such trip to be of not more than five days' duration, may secure permit from the Probate Judge of the first county in this State which he enters, under such rules as the State Tax Commission may prescribe and upon the payment to the Probate Judge of a permit fee of $1.00 and an issuance fee of 50c which permit shall grant the holder thereof two trips as above set forth during the month in which said permit is issued."

In the absence of any reciprocal agreement entered into as authorized by Schedule 158.15, a non-resident using a motor vehicle in Alabama for commercial purposes would be required to secure the permit in the manner and amount above described.

You will also note the provision in Schedule 158.15 to the effect that the State of Alabama may enter into reciprocal agreements with other states for an exchange of rights for the operation of motor vehicles that would be considered as a fair exchange of rights and privileges. If in your inquiry you have referred to an actual case of a party operating between Tennessee and Alabama then, in such event, the provisions governing the license for such party would be those contained in the reciprocal agreement between the State of Tennessee and the State of Alabama regulating the operation of motor vehicles in the two states, dated June 21, 1938. This agreement was entered into in accordance with the provisions of Schedule 138.15 and has the effect of law. Section 1, paragraph 1(a) provides.

"Paragraph 1 (a) Privately owned passenger motor vehicles operating for pleasure purposes, and not operated for compensation, which are properly licensed and registered in the State of which the owner or operator is a legal resident and which has complied with all of the laws relative to the operation of motor vehicles in said State, may be operated

in either of the States without registration or licensing for a period of ninety days; after the expiration of the ninety day period, said vehicle or vehicles must be licensed with a non-resident permit or registered in accordance with the laws of the said State."

Subsection (b) of paragraph 1 of Section 1 provides:

"(b) Any private passenger automobile owner who enters either State from the other State in his vehicle to secure employment and is employed in said State, must register his vehicle the same as residents of that State."

While the facts set forth in your letter are not sufficient for me to give you a categorical answer to your inquiry, the following conclusions on assumed facts may be helpful to you.

1. If the party described in your letter does not operate his automobile for compensation and if the same is properly licensed and registered in Tennessee and if he is a legal resident of Tennessee and has complied with all of the laws relative to the operation of motor vehicles in Tennessee, he may operate his automobile in Alabama without registering or licensing for a period of ninety days but after such date he must secure a non-resident's permit in accordance with the provisions of Schedule 158.15 quoted above.

2. If, however, such owner has entered the State of Alabama to secure employment and is employed in this State, he must register and secure license plates for his automobile in the same manner as residents of the State of Alabama.

Answering your inquiry number three, I call your attention to Section 404 of the Revenue Laws of 1935, which section provides as follows:

"Section 404. Justices of the Peace shall have jurisdiction concurrently with the county courts when violations of the revenue laws are committed within the territorial jurisdiction of a justice of the peace in any county in the State of Alabama and where such violations are made a misdemeanor under the revenue laws."

You will see that by the foregoing provision, justices of the peace are given final jurisdiction of all misdemeanor offenses arising in connection with the revenue laws, provided, of course, that such violation occurs in their territorial jurisdiction. In view of this section, justices of the peace would have final jurisdiction in the cases covered by Section 352(a).

Answering your inquiries numbers four and five, you are advised that the justices of the peace have final jurisdiction in cases of violation of the license tag law for the reasons stated above.

Answering your inquiry number six as to the section under which prosecutions of residents of Alabama purchasing their tags in Tennessee for the purpose of evading the Alabama license tax should be had, I call your attention to the provisions of Section 352(a) which are as follows:

"Section 352. (a) It shall be unlawful for any person, firm or corporation to engage in or carry on any business, or do any act for which a license is required now or may hereafter be by law, without having first paid for and taken out a license therefor in the manner in this Act provided. Any person who is convicted of failing to take out and pay for the license required shall be fined not less than the amounts of all licenses required of him, and if convicted for refusing to take out the license shall on conviction be fined not less than the amount of the State and county license due by him and not more than one hundred dollars ($100.00) in addition thereto, and may be sentenced to hard labor for the county for not more than six months; all fines to be paid in money, and when collected two-thirds shall be paid to the State and one-third to the county."

You are advised that prosecutions may be brought either under this section or under the provisions of Schedule 158.16 which make it unlawful for any person "to use upon his car any tag in imitation of or substitution for real tags lawfully used."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 12, 1939.

Hon. Matt A Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

1. Person operating nickel coca cola vending machine only held liable for both soft drink and vending machine license (Schedules 128 and 154, as amended, of the Revenue Acts of 1935).

2. Person selling soft drinks generally and also operating a nickel coca cola vending machine in the same location held liable both for soft drink and vending machine license (Schedules 128 and 154, as amended, of the Revenue Acts of 1935).

3. Person liable for both vending machine and soft drink license, even though coca cola vending machine is operated for employees with profit being used for employees' amusement (Schedules 128 and 154, as amended, of the Revenue Acts of 1935).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letters of July 20, 1939, and July 21, 1939, in which you request my opinion as follows:

"Your opinion is requested as follows:

"Is a person who obtains soft drink licenses under Schedule 128 also liable for a nickel vending machine under Schedule 154 for Coca Cola?

"What license is a person liable for in selling soft drinks generally, and also operating a nickel vending coca cola in the same location?

"What license would be required where a person only operates a nickel vending coca cola machine?

"Is a person or firm liable for a soft drink or vending machine license whereby a vending machine vending coca cola is operated solely for the employees and the entire profit from same is used by said employees for forms of amusement etc.

"The Attorney General has rendered an opinion in re vending machines for cigarettes, tobacco products sold generally, etc., in Biennial Report for 1936-1938, page 327.

"Kindly favor us with an early reply as to the above opinions."

Answering first your inquiry regarding the license required of a person operating only a nickel coca cola vending machine, I call your attention to Schedule 154 of the Revenue Acts of 1935, as amended by H. B. 70, approved February 2, 1937 (General Acts 1936-37, p. 32). This schedule provides for a vending machine license as pertinent as follows:

"For **each machine** for vending gum, candies, cigarettes, music * * * **or other articles:** * * * Where machine is operated by nickels or coins of larger denomination eight dollars ($8.00) * * *."

In my opinion, a machine vending coca colas is a "machine for vending * * * other articles" within the meaning of Schedule 154. You will note from the above quotation that the license is levied on "each machine." The privilege of selling merchandise by machine is distinct and apart from the privilege of vending wares in the regular manner. Schedule 154 provides a distinct privilege license based upon this difference. In **Dunlap v. State,** 16 Ala. App. 440, 78 So. 638, the Court of Appeals decided that a license tax on a penny-in-the-slot machine used for vending chewing gum was not a license upon the chewing gum nor upon dealers in chewing gum "but only penny-in-the-slot machines, for whatever purpose or purposes they may be operated." Judge Samford speaking further for the Court of Appeals says:

"The chewing gum merchant can sell his wares in the regular way without being subject to the license, but if he elects to operate or use a device for which a license is required, he pays the license on the device, and not on the chewing gum. The law is not a prohibition of the use of the machine but merely places a license for its use, which is not in violation of constitutional provisions as to extent or uniformity of tax rate upon property or as to discrimination. Phoenix Carpet Co. v. State, 118 Ala. 143, 22 South. 627, 72 Am. St. Rep. 143."

Schedule 128 imposes a soft drink license upon persons engaging in the "business of selling at retail cereal beverages, carbonated or other soft drinks kept on hand and sold in bottles." Subdivision (a) of Schedule 128 provides for a license for a person engaging in the soft drink business and conducting a soda fountain in connection therewith. As stated, the sale of bottled soft drinks in the regular manner and by machine constitutes separate privileges. Where a person operates a nickel coca cola vending machine only, it is my opinion that he is engaging in the business both of operating a vending machine (for which a license is required) and of selling at retail carbonated soft drinks kept on hand and sold in bottles (for which a license is also required). Under the provisions of Section 357 of the Revenue Acts of 1935, it is declared to be the intention of the Legislature that wherever "two or more licenses on the same business or occupations are required * * * all such licenses as are herein levied shall be collected without credit or off-set, except where specific provision is made therefor." In my opinion, giving effect to the legislative intent expressed in Section 357, the conclusion must be reached that a person operating a nickel coca cola vending machine only is liable both for the license imposed by Schedule 154, as amended, and by Schedule 128.

While it is true that the 1937 amendment to Schedule 154 contains the provision that "any schedule of this act (the General Revenue Acts of 1935) in conflict with the provisions of this schedule are hereby repealed," there appears no conflict between Schedule 128 and 154, as amended, when considered in the light of the foregoing conclusions.

It follows from the foregoing reasoning that a person who sells soft drinks generally and obtains the soft drink license required by Schedule 128 and who operates a nickel coca cola vending machine in the same location would also be liable for the vending machine license levied by Schedule 154.

You next inquire whether a person or firm is liable for a soft drink vending machine license where a coca cola vending machine is operated solely for the employees and the entire profit is used by the employees for amusement etc. I presume that in propounding this question you have in mind the following provision of Schedule 154, as amended:

> "Provided that nothing in this schedule shall apply to machines installed by any person, firm or corporation in its place of business, vending necessary articles on a non-profit basis for emergency use only by the employees of such person, firm or corporation."

You will note that the exception described in the foregoing proviso relates to machines vending "necessary articles * * * for emergency use." A coca cola, however, desirable, could hardly be described as a "necessary" article for "emergency use." You are, therefore, advised that such persons or firms would be liable for the vending machine license imposed by Schedule 154, as amended, and for the soft drink license imposed by Schedule 128.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 12, 1939.

Hon. H. G. Davis,
Sheriff, Pickens County,
Carrollton, Alabama.

Constables—

1. Constable authorized to serve any process directed to him by lawful authority in any part of his county.

2. Constable restricted to his own election precinct to search for prohibited liquor without warrant.

3. Constable is law enforcement officer within the meaning of the Uniform Firearms Act.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of June 28, 1939, in which you request my opinion as follows:

"The Constitution and Chapter 271, Sections 6794-6803 of the Code of Alabama (1923) provides for Constables, their election, appointment, bond, sets out their duties, etc. Chapter 113, Art. III provides for County Courts, etc.

"I wish to submit to you for your opinion several questions concerning the territorial jurisdiction of constables in this County appointed by the Governor or Justices of the Peace.

"1. Where a Constable of a certain election precinct makes affidavit as to the commission of some misdemeanor or felony as provided for by the Code for procedure in such cases in the County Court, and the County Judge issues a warrant of arrest,

"(a) May the Constable serve the warrant of arrest issued by the County Judge in his own election precinct? (b) May he serve it anywhere else in the County other than his own election precinct? (c) May the Constable approve the bond in such case or does the sheriff or his deputy have to approve the bond and admit the prisoner to bail?

"2. What warrants or other criminal processes may a Constable serve and in what precincts in the County of his residence?

"3. Section 6798 of the Code of Alabama (1923) provides that 'Every Constable is a conservator of the peace within his County.' May a Constable of one beat go into another beat in his county of residence and arrest a law violator without a warrant? May a constable of a certain election precinct go on private property in that precinct without a search warrant and search for a still or can he go on private property

in a beat other than his election precinct and without a search warrant or without permission of the owner of the property search for a still and not be guilty of Trespass after warning? In what beats may he execute a search warrant?

"4. May a Constable transport whiskey or other illegal liquors in any beat other than his election precinct and not be liable to prosecution?

"(5) May a Constable carry a gun or pistol in any precinct other than his election precinct because he is a Constable and not violate the Uniform Firearms Act?"

Your request presents two general propositions. They are (1) what are the territorial limitations of the authority of a constable? and (2) is a constable a law enforcement officer within the meaning of the Uniform Firearms Act?

The Constitution provides for an election of constable. It does not, however, prescribe his duties or powers but leaves that to the Legislature. The duties of a constable are set out by the Legislature in Section 6799 of the Code of Alabama of 1923, which reads as follows:

"6799. Duties.—His duties are—

"1. To attend the terms of the circuit court of the county when summoned by the sheriff for that purpose.

"2. To execute and return all summons, executions, and other process to him directed by any lawful authority.

"3. To pay over moneys collected by virtue of his office to the person entitled thereto.

"4. To attend the regular term of the justices' courts in his precinct.

"5. To perform such other duties as are, or may be, required of him by law."

The duties as hereinabove set out are not limited to the precinct of the constable except as to services in the justice of the peace court. He may perform any of these duties anywhere in the county since he is the conservator of the peace in his county (Section 6798 of the Code of 1923).

Justice Somerville, speaking for the court in the case of **Henry v. Waldrop,** 206 Ala. 135, 89 So. 371, said:

"Section 3329 (the forerunner of our Section 6799, supra) prescribed his duties as to which he is not restricted to the limits of his own precinct, except as to his attendance upon justices' courts."

Again let me quote from the Waldrop case, supra:

"It is entirely clear that within his county the area within which he may or must officially serve is a matter of legislative prescription to

be ascertained with respect to any particular duty from the terms of the statute which imposes it."

In my opinion, a constable may serve any criminal process directed to him by lawful authority anywhere in the county since this is a duty imposed upon him by the Legislature in the Code section cited above.

The court, in the case of **Edmonds v. State,** 199 Ala. 555, 74 So. 956, stated:

"One of the duties of a constable is to execute and return all summons, executions and other processes to him directed by any lawful authority.

"In Code Section 3329, the act provides 'that the warrant shall be directed to the sheriff or to any constable of the county.' Its execution in this case by the constable of beat 10 (in beat 1) was unquestionably lawfully authorized. If authority for this conclusion were needed it can be found in Noles v. State, 24 Ala. 672."

In an opinion of this office to Hon. W. S. Jones, found at page 428 of the Biennial Report of the Attorney General, 1930-32, it was held:

"Answering your second inquiry, I do not think the constable of one precinct would be authorized to go out of his beat and indiscriminately raid and capture stills * * *. As stated above, he is only able to serve search warrants by special enactment, as cited above. To hold otherwise would be in effect to clothe him with all of the power of the sheriff in such matters and could but end in a general confusion and clash of authority."

To briefly conclude our findings set out above, permit me to say that it is my opinion that the constable may exercise the usual authority of a peace officer in his own precinct, and in addition, he may serve any writ or warrant directed to him by lawful authority anywhere within his county.

The second general proposition presented by your request is whether or not a constable may carry a gun or pistol and not violate the Uniform Firearms Act. Our Uniform Firearms Act was passed in 1936 and is found at page 51 of the General Acts of the Extra Session of 1936. Section 6 thereof reads as follows:

"The provisions of the preceding section shall not apply to marshals, sheriffs, prison or jail wardens or their deputies, policemen or other law enforcement officers."

It is our opinion that the constable will come within the meaning of the above section where it is stated "other law enforcement officers." He is clearly a law enforcement officer within his jurisdiction. Therefore, he comes within the exemptionary section of the Uniform Firearms Act.

For your convenience, we set out below the questions as asked by you with the answers thereto based upon the conclusion hereinabove set out.

"1. (a) May the constable serve the warrant of arrest issued by the county judge in his own election precinct?"

Answer: Yes

"(b) May he serve it anywhere else in the county other than his own election precinct?"

Answer: Yes

"(c) May the constable approve the bond in such case or does the sheriff or his deputy have to approve the bond and admit the prisoner to bail?"

Answer: We find no provision of law giving the constable this authority.

"2. What warrants or other criminal processes may a constable serve and in what precincts of the county of his residence?"

Answer: He may serve any warrant or criminal process directed to him by lawful authority anywhere in his county.

"3. (a) May a constable of one beat go into another beat in his county of residence and arrest a law violator without a warrant?"

Answer No (Except in situations where even a private citizen would be permitted to make an arrest.)

"(b) May a constable of a certain election precinct go on private property in that precinct without a search warrant and search for a still?"

Answer: Yes

"(c) Can he go on private property in a beat other than his election precinct and without a search warrant or without permission of the owner of the property search for a still and not be guilty of trespass after warning?"

Answer: No

"(d) In what beats may he execute a search warrant?"

Answer: The constable may execute a search warrant in any beat in the county of his residence.

"4. May a constable transport whiskey or other illegal liquors in any beat other than his election precinct and not be liable to prosecution?"

Answer: This question is not quite clear to us. If the constable is transporting whiskey in a beat other than his own through the execution of some order of the court directed to him, then, of course, our answer would be in the affirmative. We believe, however, that the general discussion above will answer your question concerning this particular point.

"5. May a constable carry a gun or pistol in any precinct other than his election precinct because he is a constable and not violate the Uniform Firearms Act?"

Answer: Yes

This opinion is based on the general laws of this State dealing with the jurisdiction of constables and does not take into consideration any local acts on the subject.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 12, 1939.

Hon. U. B. Sullivan,
Tax Collector,
Pickens County,
Carrollton, Alabama.

Bonds of Tax Collectors must be determined and approved by State Comptroller unless provisions of a special or local law conflicts with a general law.

Opinion by Assistant Attorney General McCall.

Dear Sir:

This is to acknowledge receipt of your request for opinion under date of August 1, 1939, which is as follows:

"Will you please give me your official opinion as to whom has the authority to fix the amount of the Tax Collectors Bond.

"On June the 12th, 1938, I filed a petition with the Commissioners Court of this County asking them to fix the amount of my official bond beginning with the term of Oct. 1st, 1939, and ending Oct. 1st, 1943. The Court set the amount of this Bond at $15000.00. A few days later I got a letter from the State Comptroller advising me that he was supposed to fix the amount of this Bond and that he had set the amount of my bond beginning with the next term at $30,000.00.

"There is not any disposition on my part or either does it make any difference as to which of these sets the amount of my bond but I merely want to be right so that there won't be any doubt about me being qualified as Tax Collector."

The matter of determining the amount of the bond and the approval of the bond of tax collectors is set out in the General Acts of the Legislature of 1935, page 334.

"Section 154. Before assuming office the Tax Collector must execute bonds in duplicate, with good and sufficient sureties, either with a surety company, or with not less than two personal sureties, payable to the State of Alabama, in an amount not less than the largest amount of collected taxes had on hand at any time during preceding fiscal year, to be determined for every county by the State Comptroller. Such bond to be approved by the State Comptroller, conditioned faithfully to discharge the duties of his office, which are or may be required of him by law during the time he continued therein, or discharges any of the duties thereof. One of such duplicates shall be filed and recorded in the office of the Judge of Probate, and the other shall be filed in office of the State Comptroller, on or before the first day of September next after his election. A new bond or bond for an additional amount may be required whenever in the judgment of the State Comptroller the public welfare demands such action. The cost of the bond required herein, if made by a surety company, shall be paid out of the general funds of the county on warrant of the court of County Commissioners, or Court of like jurisdiction, and same shall be a preferred claim against the County. The provisions of this Section shall not apply where the same, or any part thereof, shall be in conflict with the provisions of any special or local law now in force or hereafter adopted."

The time for filing the bond of the duly elected county tax collector is on or before the 15th day of September next after the election as provided by the General Acts of Alabama, 1935, page 754.

I do not find any local or special laws pertaining to Pickens County in conflict with this section, therefore, it is my opinion that the State Comptroller determines the amount of bond to be executed by the tax collector and the State Comptroller must approve the same.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 12, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Itinerant vendor—Licenses—

1. Agents of companies selling patent medicines etc. traveling in vehicle and making deliveries from a stock not in a regular store are liable for payment of license fees under Schedule 104 of the Revenue Acts of 1935, as amended.

2. Agents soliciting orders and returning to a regularly operated store for the filling of same are not itinerant vendors within the meaning of the Revenue laws.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your request for official opinion of June 13, 1939, as follows:

> "We have a party in this county selling Watkins Products. He has a stock of merchandise that he keeps in the county but does not deliver this merchandise until after he takes the order. He goes from house to house by car, takes orders and later delivers this merchandise from his stock in this county. Is he subject to license under schedule 104 of the 1935 Revenue Acts? If this party should open a store and keep this merchandise in the store stock, take orders and then deliver from his stock, would he be subject to the above license?"

From the facts presented in your request, it does not appear that the agent of the Watkins Company has a definite place of business. Furthermore, I presume that the Watkins line includes only spices, flavoring, extracts, toilet articles, soaps, insecticides and other packaged articles of like nature commonly used on the farm or in the home as set out in Sub-section (f) of Schedule 104, infra. In addition to this, you state that he goes from house to house by car. Therefore, I am of the opinion that under these circumstances he should pay the license as set out in Subsection (b) of Act No. 43 of the Extra Session of 1936, which amends Schedule 104 of Section 348 of the 1935 General Revenue Act (Acts 1935, page 484), found on page 26 of the General and Local Acts for that session, which reads as follows:

> "(b) Each itinerant vendor or peddler of spices, flavoring, extracts, toilet articles, soaps, insecticides, stock and poultry supplies proprietary medicines and household remedies in original packages and other packaged articles of like kind commonly used on the farm and in the home, who use a motor vehicle solely for the purpose of transporting merchandise from house to house or place to place who do not use such vehicle for the display of merchandise or as a rolling store and who do not permit purchasers or prospective purchasers to enter said vehicle for the purpose of inspecting or purchasing merchandise shall pay an annual license of Forty Dollars ($40.00) to the State and Forty Dollars ($40.00) to each county in which they do business, provided, however, that those who use a vehicle as herein provided, other than a motor vehicle, shall pay an annual license of Twenty Dollars ($20.00) to the State and Ten Dollars ($10.00) to each county in which they do business, and those who operate without a vehicle of any kind shall pay an annual license of Ten Dollars ($10.00) to the State and Ten Dollars ($10.00) to each county in which they do business."

The provision in Subsection (a) which reads:

> "The foregoing shall not be construed to apply to the sale of patent or proprietary medicines or household remedies in original or unbroken packages upon which are written or printed directions for use,"

renders this particular subsection of the section inapplicable to the situation presented in your request.

See Volume II, Quarterly Report of Attorney General at page 272 where a situation on all fours with the one presented here was ruled on as stated above. The 1936 Act, supra, amending Schedule 104, supra, was passed after

the rendition of said opinion, but it did not change the same in respects material to the situation dealt with in that opinion.

Cf. opinion of this office to Hon. William Varner, Judge of Probate, Macon County, under date of June 24, 1938, found on page 115 of Quarterly Report of Attorney General, Vol. XI.

In regard to your second question, we are of the opinion that, if an agent is operating a regular store and takes orders for the goods in question, but returns to the store and fills them there and then makes the delivery, he is not liable for the license required in the above instance.

The license schedule set out above is applicable only to itinerant vendors or peddlers. To our mind, a regularly established merchant conducting his business and merely soliciting orders from house to house and returning to his establishment to fill these orders is not within its purview.

As was held in our opinion in Vol. II of the Quarterly Report of the Attorney General, supra, the person who goes from place to place and sells his products is an itinerant vendor or peddler. In this particular opinion the person operated from some specific place. However, it was not a **regularly operated store** and hence he was held liable for payment of the itinerant vendor's license. In your situation, therefore, if the agent merely opens a place of business in which to keep his merchandise and does not operate it as a store, then it is my judgment that he would be liable for the license set out above since he would not be operating a **regular** store.

It has been said by our courts that "the law abhors dodgers and will not tolerate subterfuges" and also that "that which is prohibited directly cannot be done indirectly and the law abhors evadors and subterfuges." **Johnson v. State,** 16 Ala. App. 425, 78 So. 419, and **In re: Opinions of the Justices,** 225 Ala. 502, 144 So. 111. I cite these to point out that if the particular agent in question opens a store merely for the purpose of evading the payment of licenses the courts will not protect him in his subterfuge.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 14, 1939.

Hon. L. H. Montgomery,
Judge of Probate,
Greene County,
Eutaw, Alabama.

Tax Collector—Premium on official bond.

Premium on official bond of Tax Collector who is appointed to fill unexpired term of deceased tax collector, is a legal and a preferred claim against the county.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated July 27, 1939, which follows:

"Please give me your opinion on the following:

"Is the premium on the bond of a county officer appointed to fill an unexpired term a legal claim against the county when the deceased officer whose unexpired term is being filled was under personal bond?"

I am informed that the county officer whose bond you inquire about in the above request, is the tax collector of your county, and I will, therefore, deal specifically with bonds and the premiums thereon of tax collectors in this opinion.

I call your attention to Section 154 of Act No. 194, page 334 of the General Acts of Alabama, 1935, which reads in pertinent part as follows:

"Section 154. Before assuming office the Tax Collector must execute bonds in duplicate, with good and sufficient sureties, either with a surety company, or with not less than two personal sureties, payable to the State of Alabama, in an amount not less than the largest amount of collected taxes had on hand at any time during preceding fiscal year, to be determined for every county by the State Comptroller. Such bond to be approved by the State Comptroller, conditioned faithfully to discharge the duties of his office, which are or may be required of him by law during the time he continued therein, or discharges any of the duties thereof. * * * The cost of the bond required herein, if made by a surety company, shall be paid out of the general funds of the county on warrant of the court of County Commissioners, or court of like jurisdiction, and same shall be a preferred claim against the County."

It is certain from the above that the premium on the bond of an elected tax collector would be a legal claim against the county. I am unable to see any distinction between the duties, obligations, liabilities, etc., of a tax collector who is appointed to fill an unexpired term of an elected tax collector and the duties, obligations, liabilities, etc., of an elected tax collector. The appointed official would be just as much an officer of the county as an elected official, and certain it is, an appointed official would be required to post a bond in the same amount, and under the same requirements as an elected official.

To hold that a county could not pay the premium on the bond of a person appointed to fill the unexpired term of an elected county official, would be placing a strain and an unreasonable construction on Act No. 191, supra. The Courts of this State do not approve of placing such a construction on statutes. **Shepherd v. Clements,** 224 Ala. 1, 141 So. 255.

It is, therefore, my opinion that the bond of the tax collector appointed to fill the unexpired term of an elected tax collector, would be a legal and preferred claim against the county.

The fact that the bond of the officer, whose unexpired term is being filled, was a personal one, would not in any sense affect this opinion.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 14, 1939.

Hon. C. B. Gullatt, Jr.,
Judge of Probate,
Russell County,
Seale, Alabama.

Truck Licenses—

1. License for motor truck purchased prior to November 15th may not be purchased on monthly declining basis, even though not brought into state until July (Schedule 158.5, General Revenue Acts, 1935, as amended).

2. Half-year license tag may be purchased for motor truck bought prior to November 15th where same is brought into state after April 1st (Schedule 158.13, General Revenue Acts, 1935).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of July 18, 1939, in which you request my opinion as follows:

"A gentleman, who is a highway contractor, operated a number of dump trucks in the State of Georgia, and each truck carried proper 1939 Georgia tag. These trucks were purchased by the contractor at different times, over a period of several years.

"This contractor brought these trucks into Russell County, in July, 1939, and made application for 1939 Alabama tags for said trucks.

"Please advise me, at your very earliest convenience if I may issue tags for the trucks on the monthly declining basis."

In my opinion, the contractor concerning whom you inquire may not purchase the license tags for the trucks in question on a monthly declining basis but may purchase the half-year license provided for in Schedule 158.13.

Schedule 158.5 of the 1935 Revenue Act, as amended by Act No. 93, approved February 12, 1937 (General Acts 1936-37, p. 108) provides for the cost of truck licenses as therein set out, and further provides, **"Except for trucks purchased prior to November 15th** of any tax year, the licenses may be purchased on a monthly declining basis." Schedule 158.5, as amended, contains a grant of special privileges in specified cases. The wording of Schedule 158.5 clearly excepts from the privilege granted to truck owners the right to purchase on a monthly declining basis any truck bought **prior to November 15th of any tax year.** Therefore, you may not lawfully issue tags on a monthly declining basis to the contractor mentioned in your inquiry as his trucks were bought prior to November 15th.

The issuance of the license tag under the facts detailed in your inquiry is governed by Schedule 158.13. This schedule provides in part that one-half the license therein provided for shall be paid plus $1.00 where motor vehicles are "acquired or **brought into the state** on or after April 1st of any tax year."

You will, therefore, charge one-half of the license provided for in Schedule 158.5 plus $1.00.

Cf. Opinion to Hon. J. S. Benson, Judge of Probate, Jackson County (Quarterly Report of Attorney General, Vol. XIV, p. 269).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 14, 1939.

Hon. E. W. Dykes,
Tax Assessor,
Bullock County,
Union Springs, Alabama.

Taxation—Tax Assessors are not entitled to commission on "Taxes in Litigation," although the litigation is not based on an objection to the assessment but due to the fact that the taxpayer is in hands of receiver.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of July 12, 1939, in which you request my opinion as follows:

"Please give me at your earliest convenience your opinion on the following matter.

"The Central of Georgia Railway has defaulted in the payment of taxes due in this County and the taxes are being accounted for by the Tax Collector as 'Taxes in Litigation.' I am contending that Section 24 of the 1935 Revenue Code does not include this in taxes in which the Tax Assessor is not allowed commissions."

In regard to your inquiry, information has been obtained from the Department of Revenue that the litigation in question is a result of the Central of Georgia Railway being in the hands of a receiver. The litigation does not involve an objection to the assessment by the taxpayer regularly entered.

Since the litigation in question does not result from an objection to an assessment by the taxpayer, regularly entered, it does not come within the purview of Section 24 of the Revenue Acts of 1935, which is as follows:

"Section 24. The Tax Assessor shall not receive commissions on errors made in assessments, on abatements or deductions from assessments allowed the taxpayer, nor on taxes on real estate bid in by the State at Tax sales, nor shall he, after the abstract book has been turned over to

the Tax Collector receive commissions on any assessment to which an objection by the taxpayer, regularly entered, may then be pending, until such objection has been disposed of and proper assessment ascertained and determined."

However, it is my opinion that you would not be entitled to commissions on said assessment until there has been a collection. Section 22 of the Revenue Act of 1935 provides as follows:

"Section 22. TAX ASSESSORS COMMISSIONS. The tax assessor shall, during the current term of the present incumbent of said office be paid commissions as now provided by law, after the expiration of the present term of the present incumbent of the office of tax assessor, the tax assessor shall be entitled to receive from the tax collector, out of the first **money collected** by him, giving him duplicate receipts therefor, one of which receipts shall be forwarded to the State Comptroller by the tax collector, the following commissions, to-wit: In counties where the **collections,** not including taxes on real estate bid in at tax sales by the State, do not exceed twelve thousand dollars, the rate of commission shall be eight per cent on the first thousand dollars, four percent on the second thousand dollars, and two percent on the remainder. In counties where collections, not including taxes on property bid in at tax sales by the State, exceed twelve thousand dollars, the commission shall be as above declared up to twelve thousand dollars, and one and one-half percent of the remainder up to sixty thousand dollars, and on all above sixty thousand dollars, one percent. He shall also be entitled to receive two percent on all collections made by the tax collector of special taxes, whether such special taxes be levied for the State or County, to be paid out of such special taxes. The tax assessor shall receive two percent commissions on all special county or district taxes levied for school purposes, but he shall not receive such commissions on such special school taxes unless he has properly apportioned such special taxes. In counties of more than one hundred and fifty thousand population according to the last Federal Census, or any subsequent Federal census, no fees or commissions shall be allowed for assessing the three mill county school tax, and the three mill district school tax, but in lieu thereof the tax assessor in such counties shall be paid by the collector of such county the sum of one thousand dollars, which is provided by law to be retained by the tax collector for the tax assessor." (Emphasis supplied)

It will be noted that the Tax Assessors are to be paid out of the first **moneys collected,** and that the rate of commission is based on **collections.** This, in my judgment, shows a legislative intention that the commissions of the Tax Assessors are computable on the taxes actually collected and not on the gross levy based on assessed valuation.—See **Crowe v. Board of School Commissions,** 228 Ala. 107, 152 So. 26.

In an opinion of this office rendered to the Tax Assessor Baldwin County on September 16, 1932 (Biennial Report of Attorney General, 1930-32, p. 1033) it was held that the Tax Assessor was entitled to his commission out of the first moneys collected but that the Tax Collector should reserve or hold back enough of said commissions to take care of any adjustments that might be necessary in view of later developments wherein the Tax Assessor made an assessment but would not be entitled to a commission thereon. Said opinion construed sections of the 1923 Code, which are substantially the same as the sections of the Revenue Act of 1935 under consideration insofar as your inquiry is concerned.

The premises considered, it, therefore, follows that you would not be entitled to commissions on the assessment in question until the taxes due have been collected by the tax collector.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 14, 1939.

Hon. L. W. Jordan,
County Superintendent,
Jackson County,
Scottsboro, Alabama.

School Trustees—Consent of—

Consent of trustees means consent of majority of those elected.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of July 12, 1939, in which you request my opinion as follows:

> "Please give me an interpretation of the term 'School Trustees of each District' as it appears in the last sentence of Section 100 School Code of 1927. Does this mean a majority of the three trustees or all of the three trustees.
>
> "There is a case in Jackson County where two trustees favor consolidation, while one trustee is bitterly opposed to it. I am requesting your opinion in order that I may advise the County Board as to whether they may authorize consolidation of this school."

Referring to Section 100 of the School Code of 1927, we find the following provision:

> "100. Consolidation of Schools.—The County Board of Education shall consolidate schools wherever in its judgment it is practicable, and arrange, if necessary for the transportation of pupils to and from such consolidated schools. But no schools shall be consolidated, by consolidating two or more schools located in different school districts, without the consent of the school trustees of each district."

You ask what constitutes the consent of the school trustees of the district within the meaning of the above quoted statute. The more specific question is whether a majority of the board is sufficient to give consent. Permit me to cite several pertinent quotations from Corpus Juris.

"Under a statute providing that words importing a joint authority to three or more persons shall, unless otherwise declared, be construed as authority to a majority of such persons, it has been held that a majority constitutes a quorum for the transaction of business." 46 C. J. 1035.

"Unless otherwise provided by statute, a majority of the members constitutes a quorum, * * *" 56 C. J. 336.

"Except where otherwise provided by statute, the concurrence of a majority of the members of a board, or a majority of those present and voting, acting at a proper meeting thereof, is sufficient to authorize or effectuate action taken by it, * * *" 56 C. J. 336.

It is my opinion, therefore, that two members of the board of trustees constituting a majority will be sufficient for the consent required under Section 100 of the School Code of 1927.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 14, 1939.

Hon. Frank N. Julian,
Superintendent of Insurance,
Capitol.

1. Insurance—Mutual insurance company organized under the provisions of Section 8419, et seq., and subject to the provisions of Section 8430, et seq., of the Code of 1923, and mutual insurance companies of other states qualified to transact business in Alabama under the provisions of Sections 8433 and 8430 of the Code of 1923 may issue policies without contingent liability—non-assessable policies — where such company is possessed of a surplus equal to the capital stock and surplus required of a domestic stock company transacting the same kind of insurance business.

2. If such a company, after the legal issuance of non-assessable policies becomes insolvent, neither the company nor its receiver may assess the holders of such non-assessable policies.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 20, 1939, in which you request my opinion as follows:

"Article VII of the Alabama Code of 1923 deals with the organization and operation of Mutual Insurance Companies other than life and Section 8430 therein contained reads as follows:

"'Assessment Against Members When Necessary.—Such company not possessed of assets at least equal to the unearned premium reserve and other liabilities shall make an assessment upon its members liable to assessment to provide for such deficiency, such assessment to be against each such member in proportion to such liability as expressed in his policy, which liability shall not be less than one additional contingent premium equal to the cash premium unless the company has a surplus equal to the capital stock and surplus required of a domestic stock company transacting the same kind of insurance.'

"Section 8433 of the above mentioned Article VII reads in part as follows:

"'Any mutual insurance company organized outside of this state, and authorized to transact the business of insurance on the mutual plan in any state, district or territory may be admitted and licensed to transact the kinds of insurance authorized by its charter or articles of association to the extent and with the powers and privileges specified in this article when it shall be solvent under this article. * * *'

"I would appreciate your giving me your opinion upon the following questions:

"1. May a mutual insurance company of Alabama, organized under the provisions of Article VII of the Code of 1923, and therefore subject to the provisions of Section 8430 as set forth above, or a mutual insurance company organized outside of this state but authorized to transact business in Alabama under the provisions of Section 8433 of the Code of 1923, (therefore also subject to Section 8430) issue policies without contingent liability—that is, non-assessable policies—where such company is possessed of a surplus equal to the Capital Stock and Surplus required of a domestic Stock Company transacting the same kind of insurance?

"2. If your answer to the foregoing is in the affirmative, and a mutual company issues non-assessable policies and later becomes insolvent, may the company or its receiver assess the holders of such non-assessable policies?"

In reply, I wish to advise you that I am confining my reply to your request to the statutes cited in the request without consideration given to any other statute of any other state wherein such company may be incorporated, and without regard to the powers which may be conferred upon the corporation through its charter, constitution and by-laws.

I wish to call your attention to Section 8424 of the Code of 1923, which provides in part as follows:

"8424. Kinds of insurance contracted for.—Any company licensed under the provisions of this article may make contracts of insurance or to reinsure or accept reinsurance on any portion thereof, to the extent specified in its articles, for the kinds of insurance, following: * * *"

You will note that this section offers authority to write such policies of insurance as may be authorized by the "articles" of the corporation or by statute.

We come now to consider Section 8430 of the Code of 1923, cited by you. I wish to call your attention to the language of this statute, which you quote, and which includes the following explicit expressions:

"Shall make an assessment upon its **members liable to assessment.**"

"Such assessment to be against each **such member** in proportion to such liability as expressed in his policy." (Emphasis supplied)

In my judgment, this language of the Legislature is too clear for construction. Our Supreme Court has often held that when a statute is perfectly clear in its language and no ambiguity arises, there is no room for construction. **Dixie Coaches v. Pete Ramsden**, 190 So. 92, and authorities cited. (Advance sheets)

Where the legislative intent appears in the language of the act itself, either expressly or by necessary implication or reasonable intendment, the language employed is sufficient, and if capable of being understood and the definite legislative purpose is expressed, such purpose must be construed to be the law. 59 Corpus Juris 605. You will note that the language used in the statute offers authority for an assessment **"upon its members liable to assessment** to provide for such deficiency, **such** assessment to be against each **such member** in proportion to such liability as expressed in his policy." (Emphasis supplied)

It is evident that the Legislature in enacting the present law, sought to and did provide for the issuance of the above named two kinds of mutual policies; the one being the policy carrying with it an assessment liability on the part of the policyholders who are referred to in the act as "members liable to assessment" and one without such assessment liability. As a safeguard to the company's policyholders, it was provided that the policy without assessment liability (the non-assessable form) could not be issued unless the company had a surplus equal to the capital stock and surplus required of a domestic stock company transacting the same kind of insurance.

Premises considered, it is my opinion that the answer to your first question must be in the affirmative, and that mutual insurance companies of Alabama organized under the provisions of Section 8419, et seq., of the Code of 1923, and mutual companies of other states legally authorized to transact business in Alabama, may issue non-assessable policies when possessed of a surplus equal to the capital stock and surplus required of a domestic stock company transacting the same kind of insurance business. See **Johnson v. School District No. 1,** 128 Or. 9, 270 P. 764.

In reply to your question number two, I wish to advise that in my judgment your question must be answered in the negative. The obligations of a mutual policyholder are wholly contractual. Our Supreme Court has held in the case of **Yorkshire Ins. Co., Ltd. of London v. Gazis,** 112 So. 154, 215 Ala. 564, that insurance contracts are construed the same as other contracts; and it was held in the case of **North River Ins. Co. of the City of New York v. Waddell,** 112 So. 336, 216 Ala. 55, 52 A. L. R. 838, that "insurance contracts must be construed in accordance with the intention of the parties appearing from the language used."

The Supreme Court of Oregon dealt with the question of assessing policyholders who by the terms of their policies were not subject to assessment, using the following language:

"The liability to pay an assessment is a matter of contract. A member of a mutual company may so stipulate to pay assessments as that upon failure to fulfill his obligation an action will lie against him to recover the same: 3 Joyce on Insurance (2nd Edition) Section 1245c. Only members who have assumed a contract obligation to pay assessments are liable therefor. A member, in order to become liable for assessments must contract to pay the same or assent to some plan or provision for levying assessments, required by the by-laws or constitution of the mutual association or by the statute authorizing the organization of the company; 3 Joyce on Insurance (2nd Edition) Sections 1251, 1253. Members insured exclusively on the cash premium plan, and who have paid their premiums in cash, as defendant has done, are not liable to an assessment for the purpose of paying losses and expenses." (Beaver State Ins. Assn. v. Smith, 97 Ore. 579, 192 Pac. 789 (1920))

Other jurisdictions have held that non-assessability or assessability is a matter of contract.

Swing v. Humbird, 94 Minn. 1, 101 N. W. 938 (1904)

Iowa E. and B. Farmers Mt. F. Ins. Co. v. Otto, 97 Mich. 522, 56 N. W. 755 (1893)

Banks v. Duckenfield, 18 N. Y. 592 (1859)

Given v. Rettew, 162 Pa. 638, 29 Atl. 703 (1894)

Mygatt v. N. Y. Protection Ins. Co., 21 N. Y. 52 (1860)

A receiver for an insolvent company has only such rights against other persons as were the property of the corporation before his appointment by the court to wind up its affairs. A receiver cannot enforce any contract beyond its terms.

Given v. Rettew, supra;

Ex parte Wilkinson, 220 Ala. 529, 126 So. 102;

53 Corpus Juris, 100.

Neither a receiver nor the court from which he derives his authority can enforce assessments against persons who held non-assessable policies.

In New York, the court spoke to this question in the following language:

"The court cannot alter a man's contract, or make him pay more or sooner than he agreed to do or in any different manner. The fact of the insolvency of the corporation, in short, cannot vary the contract of a member of a mutual insurance company. His liability is fixed by contract." (Williams, Receiver v. Lakey, 15 How. Pr. (N. Y. 206 (1857)

Premises considered, it is my opinion that if a mutual insurance company that has legally issued non-assessable policies later becomes insolvent, then such non-assessable policyholders are not subject to assessment or contingent liability.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 14, 1939.

Hon. Chris J. Sherlock,
Director, State Highway,
State Capitol.

Counties: State Highway Department authorized to require counties to provide rights-of-way by expending gasoline funds for beautification purposes, when such beautification is incidental to construction, maintenance, supervision, repair and policing of the roads and bridges of the county.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion dated July 24, 1939, which follows:

"Re: Highway Improvements.

"I have read a copy of the opinion addressed to the Honorable J. F. Posey, Judge of Probate of Autauga County, dated July 22, 1939, requesting information as to Courts of County Commissioners or Boards of Revenue expending "gasoline funds" in securing rights of way for beautification of State Highways. Inasmuch as this request did not contain, in the opinion of the writer, sufficient information for a complete answer, the following information is hereby supplied with the request that your office render an official opinion on same.

"The present day volume and speed of traffic requires for its function wider and flatter shoulders and slopes and more sight distances on Highways than was formerly necessary. **The Federal Government supplies** annual appropriations to this Department for use in so called beautification programs, which are, in essence, the widening and making safe of the right of way. When shoulders and slopes are flattened, the Department is able to remove guard rails and other obstructions that interfere with sight distances and clearances.

"This highway safety improvement work is done without any cost to the county other than the securing by the county of the necessary rights of way. Therefore, please advise this Department if it has the right, legally, to require counties to provide the rights of way for this type of work."

Under the facts stated, it is my opinion that the State Highway Department has authority to require counties to provide rights-of-way by expending gasoline funds for the type of work stated in your request.

You state that the Federal Government grants annual appropriations to the State Highway Department for use in so-called beautification programs, which are, in essence, the widening and making safe of the rights-of-way. That in performing this work, the shoulders and slopes are flattened and widened, that the highways are greatly improved from the point of safety, and that the beautification of said rights-of-way is purely secondary.

Schedules 156.9, 156.10 and 156.11 of Section 348 of Act No. 194, General Acts of Alabama, 1935, with the exception of Special or Local Acts of 1936

dealing therewith, control the use of the gasoline tax by counties, and provide that the only purposes to which such funds can be applied is for the **construction, maintenance, supervision, repair or policing** of the roads and bridges of the county.

Since the beautification program of the State Highway Department is ultimately for constructing and repairing the highways, and the actual beautifying of the rights-of-way is merely incidental thereto, it is my conclusion that the counties have a legal right to expend the gasoline funds to procure such rights-of-way.

The instant inquiry is analogous to the problem involved in an opinion of this office rendered to the County Treasurer, Mobile County, December 10, 1929, appearing in Biennial Report, Attorney General 1928-30, page 702. Said opinion holds that expenditures of funds for planting Bermuda Grass on the "Berms" or edegs of concrete highways is a part of the construction, and may be paid for out of the funds obtained from bond issues for building highways.

This office ruled in an opinion to Hon. J. F. Posey, Judge of Probate, Autauga County, July 22, 1939, that Courts of County Commissioners or Boards of Revenue have no authority to expend gasoline funds in securing rights-of-way along and outside of the regular highways of the State for a beautification program. Said opinion is not in conflict with this opinion in that it correctly states that the gasoline tax fund cannot be used merely to beautify the highways when such beautification is not in any way connected with the constructing, maintaining, supervising, repairing or policing the roads and bridges of the County. However, if the beautification of said highways is purely incidental to the constructing and repairing of same, the use of the gasoline tax fund for such purposes is proper.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 14, 1939.

Hon. C. E. McNatt,
Clerk, Circuit Court,
Franklin County,
Russellville, Alabama.

Solicitor's Fees—

The solicitor's fee for a conviction for violating the Revenue Law, under Section 4268 of the Code of Alabama of 1923, is $30.00.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 3, 1939, in which you request by opinion as follows:

"If a person is convicted for violating Section 4268 of the Code of Alabama for keeping a billiard table without applying for a license, what Solicitor's Fee should be charged in the bill of costs? Should the Solicitor's Fee be $30.00 or $10.00?"

Under Section 3738, Code of Alabama, 1923, which has to do with fees and commissions of solicitors, there is no specific fee provided for a prosecution under Section 4268 of the Code of Alabama of 1923, therefore, we will have to look to some general provision of law. We call your attention to the following subsection of Section 3738, supra, which subsection is as follows:

"For each conviction of a violation of the Revenue Law, not otherwise provided for ..... $30.00."

See Biennial Report of Attorney General, 1928-30, page 224; Biennial Report of Attorney General, 1928-30, page 26; Biennial Report of Attorney General, 1928-30, page 416.

A conviction under Section 4268, supra, would be a conviction for violating the Revenue Law of the State. This section is as follows:

"4268. Operating billiard table without license; penalty.—Every person, firm or corporation who shall keep or permit to be kept or used, any billiard table, or tables, within a city or incorporated town in this state without having applied for a license as provided by this article, shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars nor more than one hundred dollars, and each day that said table is operated without a license shall be deemed a separate offense."

Therefore, the solicitor's fee in this particular case is $30.00.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 14, 1939.

Hon. Frank M. Stewart,
Executive Secretary,
Alabama State Milk Control Board,
Montgomery, Alabama.

Milk Control Board—Enjoining Licenses—

The Alabama State Milk Control Board may not enjoin a licensee under the Alabama State Milk Control law from selling or offering to sell milk at prices less than the minimum prices fixed by said Board to Fort McClellan or any other agency of the Federal Government within territory ceded to the Federal Government for the purposes enumerated in Art. I, Section 8, Clause 17 of the Constitution of the United States.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 27, 1939, in which you request my opinion as follows:

> "Can the Alabama State Milk Control Board enjoin a licensee under the Alabama State Milk Control Law from selling or offering to sell milk at prices less than the minimum prices fixed by said Board to Fort McClellan or any other Agency of the Federal Government located within a duly designated milk shed within the State of Alabama?"

The operation of the Alabama Milk Control Law over those parts of the State which have been ceded to and accepted by the Federal Government for certain specified uses presents many complicated questions, which present-day economic trends and recent court decisions have made more obtuse than more simple.

As we understand the situation out of which your request arises, the Alabama State Milk Control Board, under authority given by the Statute (General Acts of 1939, page 267), designated a milk shed which includes Ft. McClellan and has set the price at which milk may be sold to the consumer in that milk shed. After this price was promulgated by the Board, Southern Dairies, Inc. submitted its bid for the sale of milk to the purchasing and contracting officer of Ft. McClellan, Alabama, on the Military Reservation at Ft. McClellan; the bid was not sent through the mail but was carried by an agent of the Southern Dairies, Inc. to Ft. McClellan and delivered to the proper authorities on the Military Reservation; and an agent of Southern Dairies, Inc., who was present at the time the offers were open was told that the bid of Southern Dairies, Inc. was accepted. By the terms of the bid made by Southern Dairies, Inc., and accepted, the milk is to be delivered by Southern Dairies, Inc. on the Military Reservation and there inspected and accepted. From these facts, it would seem that the offer was made and accepted on the Ft. McClellan Military Reservation, and the contract entered into as a result of such offer and acceptance is to be performed and fulfilled on such military Reservation.

Now, under the existing facts, you would like to know if you can enjoin the license, Southern Dairies, Inc. from selling milk to the authorities at Ft. McClellan at the price set in its contract, which is below the price set by the Board.

It is my opinion that the licensee cannot be enjoined from fulfilling his contract.

The primary question for determination is whether the laws of the State regulating the price of milk can have force and effect within lands ceded to and accepted by the Federal Government.

The Act of 1939, page 267, is a "milk control law" of the same general class as those held constitutional in **Nebbia v. New York,** 291 U. S. 502, 78 L. ed. 940, in **Highland Farms Dairy v. Agnew,** 300 U. S. 608, 81 L. ed. 835, in **Franklin v. State,** 232 Ala. 637, 169 So. 295 and in **Taylor v. State ex rel,** 186 So. 463. No question has been raised as to the validity of this opinion, we may assume it to be constitutional in all respects.

The United States Constitution provides in Article I, Section 8, Clause 17, as follows:

"The Congress shall have power * * * to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;—and"

The Code of Alabama, 1923, Sections 1505 and 1506, provides:

"1505. Cession of certain lands to United States.—The State of Alabama has ceded to the United States of America jurisdiction over all lands which have been or may hereafter be purchased or otherwise acquired by the said United States in the State of Alabama, for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom house, light house, post-office, or public building of any kind whatever, and the legislature of the State of Alabama has consented to all such purchases or acquisitions by said United States of America."

"1506. Duration of jurisdiction.—The jurisdiction ceded shall continue during the term the United States of America shall remain owner of the land so purchased, and shall be exclusive for all purposes except that the service of process issued out of the courts of the State of Alabama, shall not be prevented therein."

Under these provisions of the Federal Constitution and the Code of Alabama, the State has ceded to the United States Government certain portions of land in this State, among which is the Military Reservation at Ft. McClellan. Furthermore, in 1935 the Legislature passed an act specifically giving Acts of 1935, p. 777).

While cases dealing with taxation are not necessarily controlling in cases concerning the police power in the recent case of **State v. Algernon Blair** (pending on rehearing in the Supreme Court) (In MS) the Court, speaking through Mr. Justice Gardner, makes the following observations on the State's **jurisdiction** within Federal Reservations, which we believe can well be applied to the present case:

"The Constitution of the United States in Article 1, section 8, clause 17, makes provision for the exercise by Congress of exclusive legislation over all places purchased by consent of the legislature of the state in which the same shall be, 'for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.' 'Exclusive legislation' is consistent only with 'exclusive jurisdiction.'—**James v. Dravo Contracting Co.,** 302 U. S. 134.

"The mere ownership and use of the land by the United States do not withdraw them from the jurisdiction of the State. But the above-quoted constitutional provision becomes applicable when the United States acquires the land with the consent of the state for the purpose there described.—**James v. Dravo Contracting Co., supra.**

"Here, it appears the United States purchased the land for the purpose set forth in the Federal Constitution. Was it thus acquired with the consent of the State? At the time of the purchase sections 898 and 899, Code of 1907, were in full force and effect. They were not codifications of the Act of 1903 (General Acts 1903, page 43). By these statutes the State ceded to the United States Jurisdiction 'over all lands which have been or may hereafter be purchased' for the purposes enumerated above, and expressly provided that jurisdiction should be exclusive for all purposes except for the service of process issued out of the courts of the State. This exception was the sole qualification annexed to the cession, and by the terms of this statute jurisdiction was ceded unreservedly to the federal government. And, in the absence of any contrary intent, acceptance of this exclusive jurisdiction, is, under all the authorities, to be presumed.—**Pound v. Gaulding,** 187 So. 468. The lands here involved were purchased by the United States after the passage of the Act of 1903, and while these sections constituted a part of the Code of 1907, now sections 1505-6, Code of 1923.

— — —

"It was recognized as a general rule of public law that whenever political jurisdiction and legislative power over any territory are transferred from one sovereign to another, the existing municipal laws (as defined in **Velas v. Manila,** 220 U. S. 345, and **Chicago, Rock Island Rwy. v. McGlinn,** 114 U. S. 542) continue in force until abrogated or changed by the new sovereign, and it was this principle that was given recognition in our recent case of **Pound v. Gaulding, supra.**

— — —

"The conclusion is therefore that exclusive jurisdiction is vested in the United States over this territory, * * *"

While, as hereinbefore stated, the Blair case relates solely to the right to impose a license tax on a contractor with the Federal Government, the Supreme Court of the United States has on occasion held that the exercise of the police power by the State was likewise applicable to operations carried on on a Federal Reservation. These cases conclude that to assert that there may be reasonable regulations of a Federal operation or agency by a state acting under its police power is to deny the complete sovereignty of the Federal Government in the discharge of its constitutional functions.

Tennessee v. Davis, 100 U. S. 257, 263;

Henderson v. Mayor, 92 U. S. 259, 271, 272;

Osborn v. Bank of U. S., 9 Wheat. 738, 867;

Johnson v. Maryland, 254 U. S. 51, 56.

In ceding this territory, the State relinquished all sovereignty so long as it shall be used by the Federal Government for any of the purposes enumerated in Article I, Section 8, Clause 17 of the Constitution of the United States, retaining only the right to service of process. These bits of territory become alien to the State of Alabama; they are no more subject to the State laws than are the states adjoining us on either side. We might well draw the analogy between this property of the Federal Government and

the territory of adjoining states. Our Legislature lacks jurisdiction over both. Taking this view of the situation, we might say that since the law specifically provides in Section 18 that it shall not apply to interstate commerce, neither should it be excepted to apply to shipments of milk from those parts of the State subject to the Legislature's power into those parts not subject to such legislative power. This is a fanciful analogy, perhaps, and we prefer to rest our opinion on stronger grounds.

It has been many times settled in the Supreme Court of the United States that the State in the exercise of its police powers has a wide latitude and can, in the exercise of such powers, impose restrictions upon the individual in many cases which apparently violate both due process and equal protection clauses of the Federal Constitution. The operation of the police power is ever increasing. But even in view of the ever-extending scope of the State's police powers, it cannot be contended that they should extend beyond the territory over which the State has jurisdiction. No matter how sympathetic we may feel toward the purpose of the Alabama Milk Control Law, and even though it is conceded that to deprive the Board of its powers to regulate the price of milk sold to Ft. McClellan will weaken the law's effectiveness in that milk shed, there are certain limits to the operation of the law. No one would claim that a state law is effective outside the borders of the state, and for the same reason, namely, lack of sovereignty, such laws are not effective within the limits of territory ceded to the United States Government to be used for purposes specified in Article I, Section 8, Clause 17 of the Constitution of the United States. The State of Alabama has given this land to the Federal Government to be governed by it just as is the District of Columbia. The Federal Government is the sole and absolute sovereignty. **Arlington Hotel v. Fant,** 49 Sup. Ct. 227, 73 L. ed. 447; **Surplus Trading Company v. Cook,** 281 U. S. 647, 74 L. ed. 1091; **Standard Oil Company v. California,** 291 U. S. 242, 78 L. ed. 775; **United States v. Unzenta,** 281 U. S. 138, 74 L. ed. 761; **Murray v. Joe Gerrick,** 291 U. S. 315, 78 L. ed. 821. See Fourth Decennial Digest, United States, Key No. 3 for other cases.

We must be sure, however, that the attempt to execute the Board's ruling is within the restricted territory. The mere fact that the licensee is dealing with an agency of the Federal Government does not remove it from the State's power of regulation. **Trinity Farm Construction Co. v. Grosjean,** 291 U. S. 466, 178 L. ed. 918. We understand that the Board is not directing its action against the agency of the Federal Government, but solely against the licensee. It will be conceded, of course, that a state cannot attempt to regulate an instrumentality of the United States or impose burdens upon it which interfere with its operation and efficiency. In the present case, however, the offer was made on the reservation, and thus out of the jurisdiction of the Board; the acceptance was also made on the reservation, and thus out of the jurisdiction of the Board; and the milk is to be delivered within the reservation, and thus out of the jurisdiction of the Board. At no time has any phase of the contract or its execution come within the jurisdiction of the Board.

The licensee has violated no ruling of the Board within the effective jurisdiction of the Board. His acts complained of have been completely beyond the jurisdictional limit of the Board's power.

We have been referred to several cases recently decided by some of the most respected State Courts in our country, which, if controlling, would lead to the conclusion that the Milk Control Board has the power to enjoin the

licensee in the instant case. We feel that we should explain wherein we have concluded that these cases are not controlling.

The case most nearly in the point is the **Milk Control Board v. Gosselin's Dairy, Inc.** 16 N. E. (2d) 641, decided by the Supreme Judicial Court of Massachusetts in 1938, in which the defendant was enjoined from selling milk to a Veterans' Hospital at prices below those set by the Milk Control Board of that State. The facts of the contract are not clearly set out, so that we connot tell how the offer was made or where delivery was to take place. In his opinion, however, Mr. Justice Qua clearly states:

> "The sole issue involved is whether the minimum prices established by order of the Board apply to contracts made for the sale of milk to the United States Government where delivery is made within the Commonwealth. We construe the agreed facts, taken as a whole, as indicating that delivery of the milk takes place within the jurisdiction of this Commonwealth. No contention has been made to the contrary."

In conclusion Mr. Justice Qua further weakens his opinion by saying:

> "In the present development of the law, the question admits of doubt, but until higher judicial authority decides otherwise, we incline to the view that a dealer furnishing milk in this Commonwealth to the Veterans' Hospital remains bound by the Massachusetts Milk Control Law."

Thus we see that in the Gosselin case, supra, there is no question of the Board's jurisdiction and the power to enforce its rule which is comparable to the question we are here considering.

Next in importance is the case of **Patterson Milk and Cream Inc. v. The Milk Control Board,** 192 Atl. 838, decided by the Supreme Court of New York in 1937. Here the licensee sold milk to an agency of the Federal Government at prices below those set by the Board. The Court reasons that a corporation is bound by State laws even when dealing with the Federal Government and cites the **Trinity Farm Construction Co. v. Grossjean,** 291 U. S. 466, 178 L. ed. 918, as controlling. There is no mention of the Board's jurisdiction, however, and so far as we can see this case bears no compelling resemblance to the facts we are considering in this opinion.

The case of **Rohrer v. The Milk Control Board,** 322 Pa. State Reports 257, while an excellent concise discussion of the Milk Industry as being one "effected with a public interest" and of the wisdom and constitutionality of price-fixing, does not deal with the questions which concern us in our present search for precedents.

The case of **Savage et al v. Martin et al.,** decided by the Supreme Court of Oregon, 1939 (Ms), is likewise a case not dealing with the question of selling Milk to a Federal Agency. It is simply a decision upholding the validity of the Oregon Milk Control Law, a question not involved in this opinion, and one already decided by our Supreme Court in **Franklin v. The State,** 232 Ala. 637, 169 So. 295.

While the authority is merely persuasive, we note that an opinion by the Comptroller General of the United States (No. A89192, September 28, 1937) holds that the police regulations of Pennsylvania fixing the price of milk cannot be extended to a Veterans' Hospital located in that State.

In the many other cases to which we have been referred, either the facts were not similar to those here involved, or the Court was simply addressing itself to the question of the constitutional validity of the statute and, therefore, we do not feel bound by them.

Basing my opinion on the recently decided case of **State v. Blair,** you are advised that it is not within the power of the Alabama Milk Control Board to enjoin a licensee under the Alabama State Milk Control Law from selling or offering to sell milk at prices less than the minimum price fixed by said Board at Fort McClellan or any other agency of the Federal Government located within territory ceded to the United States for one or more of the purposes enumerated in Article I, Section 8, Clause 17 of the Constitution of the United States.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 16, 1939.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Under Section 292 of the General Revenue Laws of 1935, redemptioner required to pay annual taxes accrued subsequent to date of original application for redemption.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your request for official opinion under date of July 31, 1939, which is as follows:

"On November 25, 1938, the third installment on an installment redemption effected by Judge Andrew Price Williams on January 25, 1936 became due and payable.

"Today Judge Williams attempted to pay said installment, but we refused to accept payment until the 1938 taxes covering the property in the installment redemption had been settled with the Tax Collector. Such procedure we believed to be the law.

"However, Judge Williams insists that we should accept his installment regardless of the status of his subsequent years' taxes, he arguing that the lien of the State at a subsequent tax sale would protect the interest of the State and that even if a lien in favor of the State attached at the time of the making of the installment redemption to all installments as well as all subsequent years' taxes, the lien would in no way be affected as regards the subsequent years' taxes if the delinquent install-

ments were collected prior to the collection of delinquent subsequent years' taxes.

"Please let us have your opinion regards this matter."

In answer to your inquiry I am of the opinion that you are correct in refusing to accept payment of the installment on the taxes until the 1938 taxes covering the property have been paid.

Section 292 of the General Revenue Laws of 1935, (General Acts 1935, page 378), provides as follows:

"Section 292. The State of Alabama shall have a lien for all unpaid partial payments as well as for taxes for any subsequent year, and in case of the failure to pay any one of said installments together with the taxes for any subsequent year, either or both, the State Land Commissioner for and in the name of the State of Alabama, shall at his option declare all said installments due and payable at once. In case of default in payment of any installment or of any subsequent taxes, the State Land Commissioner in the name of the State shall have a right to file a bill in equity to foreclose the lien of the State, and in such suit all parties at interest shall be made parties defendant. Such suit shall be filed in the County where the land or the major portion thereof is situated. The Court shall determine what amount, if any, of such taxes or installments are illegal, and in its final decree shall determine the total amount due on such installment payments, and any unpaid subsequent taxes, and shall render judgment therefor which shall include costs and shall order the property sold to satisfy the decree in the same manner as in the foreclosure of mortgages on real estate in the Court of Equity. If at such sale no one bids a sufficient sum to pay the full amount of the decree, the officer conducting the sale shall announce that the real estate is sold to the State of Alabama for the amount of the decree, interest and costs, and the sale shall be reported to the Court and be confirmed and a deed made to the State of Alabama, and the State shall be entitled to a writ of possession. The purchaser at such sale, including the State shall be entitled to a deed, and the same processes and remedies to obtain possession of the premises as in other suits where land is sold under order of a court of equity, and the title to the land conveyed by such deed shall be indefeasible as to all parties defendant in the action."

The Attorney General on July 9, 1936, in an opinion to Hon. W. W. Hill, Judge of Probate, Montgomery County, held in part as follows: "It would appear that if the annual redemption payment is payable subsequent to the due date of the annual taxes paid to the collector, that the redemptioner should make some showing to you, either by tax receipt or other satisfactory evidence that the annual taxes accrued subsequent to the redemption have been paid." Biennial Report of Attorney General, 1934-36, page 727.

Trusting that this answers your inquiry, I am

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 16, 1939.

Hon. J. A. Carnley,
Judge of Probate,
Coffee County,
Elba, Alabama.

Filing tax—Option subject to no filing tax. Instrument construed to be option.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of July 11, 1939, which is as follows:

"Am enclosing copy of an instrument filed for record in this office a fee days ago. Please examine this instrument and let me know if there is any tax due on this kind of instrument and if so, the amount of tax, or under what schedule."

The instrument which you enclosed is as follows:

"STATE OF ALABAMA
COFFEE COUNTY

"This agreement made on this the 23rd day of June, 1939, by and between W. S. Huey and wife, Katie Mae Huey, hereinafter called First Parties, and Sherrill Oil Company, a corporation, whose principal office is located at Pensacola, Florida, and which said corporation is hereinafter called Second Party,

"WITNESSETH

"That the said First Parties for and in consideration of the sum of FIVE THOUSAND AND NO/100 DOLLARS to be paid as follows: $1,000.00 on the delivery of this instrument to Second Party and further sum of $4,000.00 to be paid on or by August 1, 1939, by said Second Party, the First Parties do hereby covenant and agree to convey to said Second Party in fee simple by warranty deed with good title, on or before said August 1, 1939, the following property, to-wit:

"One lot of land located in the City of Enterprise, Coffee County, Alabama, and better described as follows: Beginning on the south side of East Adams Street and running thence South along the east side of North Carmichael or North Main Street for a distance of 100 feet, thence eastward and parallel with said Adams Street 100 feet, thence northward and parallel with said North Carmichael or North Main Street 100 feet and to south side of said Adams Street, and thence westward along south side of said Adams Street 100 feet, and to starting point.

"But First Parties reserve to themselves all improvements on said lot including buildings, underground tanks etc., and which are to be moved by First Parties on or before August 1, 1939.

"Also as part of above stated consideration, First Parties further contract and agree to give Second Party along with aforesaid warranty deed a lease to the common use with First Parties, their heirs, devisees and assigns, to a strip of land lying on south side of foregoing described lot and which said strip of land faces or fronts said North Carmichael or North Main Street twenty-four feet and runs back eastward twenty-eight feet, said lease to run for a period of fifteen years from August 1, 1939, or until August 1, 1954.

"Also as a further part of aforesaid consideration, First Parties contract and agree with Second Party that should First Parties determine to sell within fifteen years from August 1, 1939, and before August 1, 1954, one lot of land facing said North Carmichael or North Main Street twenty-four feet and running eastward one hundred feet and lying immediately south of the lot hereinabove agreed to be conveyed to Second Party, that Second Party shall be permitted to make purchase of said lot, provided, Second Party will pay such price as may be offered by some bona fide purchaser within ten days after notice of offer to buy by such third person, and provided further that such price may be acceptable to First Parties their heirs and devisees.

"It is understood and agreed between the parties hereto, that the First Parties shall execute both aforesaid deed and lease or easement in favor of Second Party and place them in escrow with the Enterprise Banking Company, Enterprise, Alabama, for delivery to Second Party upon the payment of aforesaid additional sum of $4,000.00, but if such additional sum of $4,000.00 is not paid by said August 1, 1939, then and in that case and event, said deed and lease or easement shall be returned by said Bank to said First Parties, time being of the essence of this contract, and the $1,000.00 paid by Second Party to First Parties upon delivery hereof, shall be held and retained by First Parties as liquidated damages.

"Witness our hands and seals in duplicate on the date above written.

"Witness: Virginia Metcalf W. S. Huey (L. S.)
Mary Hope Huey Katie Mae Huey (L. S.)"

It is my opinion that the above instrument is in effect an option.

"An 'option to purchase' realty is a unilateral contract, whereby the owner agrees with the holder of the option that the latter has a right to buy the property according to the terms and conditions of the contract, constituting merely the right to an election, the holder of which is not bound to complete the same. Morgan v. Forbes et al., 128 N. E. 792, 793, 236 Mass. 480." Words & Phrases, Third Series, page 650.

The New Jersey courts, in construing a similar instrument in **Sooy v. Henkelman,** 142 Atl. 17, said:

"An opition and not a contract to purchase is affected by an agreement to sell real estate for payments to be made within a specified time and providing for forfeiture at any period upon failure to make payments,

where the purchaser does not agree to purchase, to make payments, or to bind himself in any way other than the forfeiture of the payments made."

In the instrument in question, the vendor agrees to convey to the vendee in fee simple by warranty deed with good title, on or before a certain date, provided vendee has made a certain payment. The vendee does not agree to purchase, to make a payment, or to bind himself in any way other than the forfeiture of the money previously paid. Therefore, it is my opinion that the enclosed instrument is an option.

An option to purchase land does not, before acceptance, vest in the holder of the option any interest, legal or equitable, in the land itself. **Varn Turpentine and Cattle Co. v. Allen and Newton**, 144 S. E. 47, 39 Cyc. 1237, G (1), 27 R. C. L. 334, 66 Corpus Juris, page 487.

Furthermore, this office has previously held that an option is subject to no filing tax. Biennal Report of Attorney General, 1934-36, page 203; Biennial Report of Attorney General, 1930-32, page 987; opinion rendered to Judge of Probate, Walker County, Jasper, Alabama, under date of February 12, 1930, reported in Office Edition, Book 16, page 167, a copy of which is herewith enclosed.

Therefore, the premises considered, it is my opinion that the enclosed instrument is an option and subject to no filing tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 16, 1939.

Hon. Frank B. Embry,
Circuit Solicitor,
St. Clair County,
Pell City, Alabama.

Dog Control Act—Persons having dogs inoculated and failing to pay the fee for same are not subject to prosecution under the provisions of Section 11 of said Act.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of July 29, 1939, in which you request my opinion as follows:

"Please advise me if under the following facts a person refusing to pay the fee of fifty cents for vaccinating a dog is subject to prosecution. In the instant case the owner of the dog had or permitted vaccination of his dog and then upon demand refused to pay the charges of fifty cents due for the vaccination.

"I assume that the question would be whether or not under Section 12 of this Act upon failure to pay, would that be an act for which the owner could be prosecuted under the law.

"Please advise me at your earliest convenience as prosecution has been begun against this person and whether or not he will be tried depends largely upon your opinion."

We have held that persons violating the provisions of the so-called Dog Control Act may be criminally prosecuted for such violation (Quarterly Report of Attorney General, Vol. XIV, p. 299). Section 11 of Act No. 184, of the Regular Session of the Legislature of 1939, reads as follows:

"Section 11. That Section 12 of the Act to which this Act is An Amendment is hereby amended to read as follows: Section 12. GENERAL PROVISIONS. Any person violating or aiding in or abetting the violation of any provision of this Act, or counterfeiting or forging any certificate, permit, or tag; or making any misrepresentation in regard to any matter prescribed by this Act; or resisting, obstructing, or impeding any authorized officer in enforcing this Act; or refusing to produce, for inoculation, any dog in his possession, not confined at all times to an enclosed area, or on leash, or muzzled, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than one nor more than ten dollars, and, for the purpose of enforcing this section, any court of competent jurisdiction, including Justice of the Peace Courts shall have jurisdiction in such offenses."

Section 6 of the above cited act reads as follows:

"Section 6. FEES. It is hereby provided that the Rabies Inspector, or other person authorized to inoculate dogs against rabies, may charge for such services a sum not to exceed 50 cents for each dog treated for Rabies. The Rabies Inspector shall keep a record of all dogs inoculated on forms furnished by the State Board of Health." (Emphasis supplied)

The question is whether or not the failure to pay the fifty cents which may be levied under the authority of Section 6, quoted above, is a violation of the provisions of this act within the meaning of the word "provision" used in Section 11.

The purpose and intent of this act is clearly to eradicate rabies in this state. When the dog has been inoculated, the main purpose of the act has been consummated. It is within the discretion of the rabies inspector as to whether or not he will charge fifty cents for such inoculation. He may refuse to inoculate until a fee has been paid; or the inoculation may be done by some other competent veterinarian.

Therefore, it is my opinion that the failure to pay the fifty cents for the inoculation of the dog is not a violation of any provision of this act within the meaning of Section 11 set out above.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 18, 1939.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Chief Examiner of Public Accounts—Audit of books and records of Justice of the Peace—

County is liable for its pro rata share of the expenses of examination of accounts, books and records of justice of the peace, as is determined by the Chief Examiner of Public Accounts under the authority of Section 752(3) of the 1936 Cumulative Supplement to Michie's Code of 1928 (General Acts 1935, p. 601 and pamphlet Acts 1939, p. 150, Sections 7 and 26).

Opinion by Assistant Attorney General Rowe.

Dear Sir:

I have your letter of June 28, 1939, requesting my opinion as follows:

"Please refer to Page 601, Act No. 218, General Acts of 1935, commonly referred to as House Bill 255, and advise me as to the following:

"1. Would I, as Chief Examiner of Public Accounts, have the right and authority to charge a County with a pro rata share of the expense of an examination of the books and accounts of a Justice of the Peace, when such examination is made by an Assistant Examiner of Accounts?"

In my opinion your inquiry must be answered in the affirmative.

Section 736 of the Code of 1923, prescribing the duties of the Department of Examiners of Accounts, provides in part that it is the duty of said deparment

"1. To examine and audit the books, accounts, vouchers and records of every state or any other officer, public institution, organization or person receiving or disbursing any funds that belong to the state or to state institutions, or to any county in the state, or any funds that have been appropriated by the legislature for any persons, institutions or organizations, or any funds from any other sources coming into their hands as such officers for official uses."

Section 749 et seq. thereof provides for payment by the county of the part of the expenses of the examination of the several county officers relating directly to, and being for the benefit of, the county.

Section 752(3) of the 1936 Cumulative Supplement of Michie's Code of 1928, provides:

"752(3). Same.—The division of departmental and county audits is hereby required to examine the records of each county officer in every county in this state at least once every two years and when said examination shall have been completed no subsequent examination for the period covered shall be made at the expense of the county. * * *

"Where the state is not interested in the examination or where the examination refers altogether to a county examination, the board of revenue or commissioners court of the county shall pay out of general funds of the county the expense of examination, but if the examination is of matters belonging to the state and the county then the state and county are each to share their pro rata share of the expense of examination to be determined by the comptroller with the approval of the governor, and if the examination is a matter belonging or appertaining to the state alone then the state shall pay all the expenses of examination."

These functions were transferred to the Finance Department by Section 7, Acts 1939, p. 150 (pamphlet), and, under the authority of Section 26 of said act the Director of Finance, with the approval of the Governor, created the Division of Examiners of Public Accounts and assigned to the Chief thereof the function of determining the pro rata share of the state and county in the expense of examination.

The determination of whether a justice of the peace is a "county officer" within the contemplation of the above quoted sections of the statute is not absolutely controlling upon the question of whether or not the expenses of an examination into the affairs of his office shall be payable in whole or in part by the county. **State v. Tuscaloosa County,** et al, 233 Ala. 611, 172 So. 892. However, if a determination that a justice of the peace is a "county officer" within the meaning of the statute providing for examinations was necessary to a solution of the question, I would not hesitate to hold, in view of the legislative history of the statutes and the evident legislative intention that he is such an officer. Section 736 of the Code of 1923 requires the examination of the books and accounts, etc. of every "state or any other officer * * * or person receiving or disbursing any funds that belong to the state * * * or to any county in the state * * ," and Section 729 thereof provides that after the completion of the examination the statement of the expenses thereof shall be made out for and in the name of the State against the county for approximately the number of days in which the examiner was engaged in the "county examination for such county." Section 752(3) of the Cumulative Supplement of 1936 is a substantial rewrite of the quoted sections of the preceding statutes.

In **Harrington v. State,** 200 Ala. 480, 76 So. 422, Mr. Justice Mayfield, speaking for the Supreme Court, said:

"On account of this variety of meanings attaching to the words 'office' and 'officer', as used in various written laws, the adjudicated cases do not always, nor even often, furnish safe guides by which to determine with absolute certainty whether or not a given employment is an office with the meaning of a given statute or other written law. Every case must of necessity be determined by consideration of the particular facts and circumstances involved. * * *"

In **State v. Tuscaloosa County, et al,** supra, the court said:

"Section 729 does not contemplate refunding to the State the expense of examining records of 'county officers', but only for the time engaged 'in the county **examination for such county.**' (Italics supplied.) What is meant by these words is the real question at issue. * * *

"Clearly enough on the examination of the books of any county officer having duties with reference to the collection and disbursement of these county funds, such portion of the examination as concerns the fidelity of the officer with regard to these funds would be a 'county examination for such county.' * * *

"Section 749, quite clearly, we think contemplates a reimbursement of the State by the county, out of funds in the county treasury, for only such portion of the State outlay as is incurred in examinations 'for the county', for the safeguarding of county funds, and not for examinations safeguarding funds of the State or its agencies devoted to State enterprises, * * *"

In the light of these declarations by the Supreme Court of Alabama, and in view of the fact that a portion of the funds collected by justices of the peace are covered into the county treasury (Code of 1923, Section 3850), and a portion of said funds (for example, Acts 1935, page 642, Section 48; Acts 1935, pages 759-60, Sections 8, 10; Acts 1939, p. 300, Section 11 (f)) are covered into the State Treasury or into agencies of the State, it is my opinion that Section 752(3) of the 1936 Cumulative Supplement to the Code of 1928 contemplates that the expense of the examination of the justice of the peace shall be shared by the state and the county, in their proper proportion as is determined by the Chief Examiner of Public Accounts, with the approval of the Governor.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 19, 1939.

Mr. H. C. Landman, Cashier,
The First National Bank,
Huntsville, Alabama.

Witness fees—

1. Scope of Section 7245, as amended by Acts 1939, Act No. 33, discussed generally.

2. All claims for witness fees, reported by the Clerk, paid over to the County Treasurer or Custodian of County funds shall be forever barred after three (3) years from the time such fees are collected, and subject to disbursement.

3. County Depository required to pay into Fine and Forfeiture Fund of county on January 1st of each year all witness fees in its hands which are shown by clerk's report to have been collected and subject to disbursement for three years.

4. Payment of registered witness claim in criminal cases is never barred.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of June 12, 1939, which is as follows:

"This bank is a depository of county funds for Madison County, and is authorized by Alabama Code Section 868 to ask for your written opinion upon questions of law arising in connection with the duties as such county depository.

"The questions arise upon an interpretation of Alabama Code Section 7245, as amended by an Act adopted at the Regular Session 1939, approved February 16, 1939, entitled: 'An Act to amend Section 7245 of the Code of Alabama of 1923, relating to presentation of witness claims within three (3) years, and transfer of unclaimed witness fees to Fine and Forfeiture Fund.'

"The questions which we desire you to answer are as follows:

"(1) How much time does a person have to present for payment a claim for witness fees to the county depository where such fees were collected by the Circuit Court Clerk prior to the amendment of Section 7245?

"(2) When is the county depository required to pay into the Fine and Forfeiture Fund of the county witness fees collected and reported by the Circuit Court Clerk prior to February 16, 1939, but less than six years before that date?

"(3) Also please advise if there is a time limit for payment of witness tickets approved by Circuit Court Clerk and registered with us, as depository, for payment, according to law."

Before answering the questions propounded by your inquiry, we deem it advisable to render our opinion on the scope of Section 7245, as amended by the 1939 Act, Act No. 33. Section 7245 as it appears in the 1923 Code was enacted in 1911 (Acts of 1911, page 200). The evident purpose of this act was to allow the various clerks to pay over to the county witness fees that they had collected and held for a long period of time. The 1939 amendment affected only the time limit and the fund into which the money should be paid.

This office has previously held that Section 7245 does not apply to criminal cases but only to civil cases. Biennial Report of Attorney General, 1934-36, page 597; Biennial Report of Attorney General, 1930-32, page 316. These opinions are hereby expressly overruled in so far as they conflict herewith. It is my opinion that Section 7245, as amended, applies to witness fees in all cases, whether civil or criminal, where the witness fees are collected by the clerk. This makes Section 7245, as amended, applicable to all civil cases in which witness fees are paid, and to all criminal cases where the witness fees pass through the hands of the clerk. Of course, in those cases where the county pays the witness fees direct from the Fine and Forfeiture Fund as provided for by Section 3763, Section 7245, as amended, would not be applicable.

This preliminary statement is here made, as it seems that various officers of the State are confused as to the scope of Section 7245, as amended.

In answer to your inquiry number 1, it is my opinion that claims for witness fees must be presented for payment within three years from the time such fees are collected by the clerk and subject to disbursement.

Under Section 7245, Code of Alabama of 1923, all witness claims in civil cases are barred unless the same are presented for payment to the county treasurer or custodian of county funds within six years. This section was amended by S. B. No. 59, approved February 16, 1939, and by this amendment the statute of limitations was changed from six to three years. I do not think the party who receives a certificate of attendance as a witness in a civil case has such a vested right as to payment so far as the statute of limitations is concerned as may not be changed by a repealing or an amendatory act. The rule has been often stated that witnesses are entitled to compensation only under statutes providing therefor. They are not entitled to compensation in cases where the statute does not so provide and where a statute relating to the calling of witnesses makes no provision for their compensation, the witness is not entitled thereto. 7 C. J. 67, Section 62.

Inasmuch as the Legislature has the right to prescribe the amount of compensation to be received by witnesses, it necessarily follows that this gratuity awarded by the State may be made payable upon such conditions as the State may impose.

Thus, as the Legislature may limit the payment of witness compensation to those cases where the witness claims his fee in six years, there is no reason why the Legislature could not reduce the time of presentation to three years.

In the case of **Blake v. State ex rel Going et al,** 178 Ala. 407, 59 So. 623, the Supreme Court of Alabama, speaking through Mr. Justice Somerville, in construing an act which provided that certain witness fees should be payable to the county Treasurer and not to the State Treasurer as provided by a former act which was repealed, stated:

> "It is a general rule, also, that when a statute is repealed it stands as if it had never existed, except as to vested rights which have accrued under its operation. 36 Cyc. 1169. Under the act of 1909, the state had acquired no vested rights in the fees in question. Doubtless it had, prior to the act of 1911, a right to compel respondent to report and pay them over to the state treasurer as their appointed custodian. But, except as it had been already executed, the influence and operation of the act of 1909 was completely nullified by its repeal in 1911. 'The Legislature has full power to take away by statute, rights not vested, which have been conferred by statute. If the repealing statute is general and unconditional, without a saving of pending proceedings and prosecutions, these fall with the statute which may have authorized them.'—Luke v. Calhoun County, 56 Ala. 415. This principle seems clearly applicable to the two acts under consideration."

The conclusion reached in the Blake case was to the effect that the unclaimed witness fees sued for, which were not reported by the clerk of the court for which they were collected, would not so vest in the state as to give it a right which could not be taken away by statute. This conclusion is particularly applicable to the instant case. In the case of **Lee, Comptroller v.**

Cunningham, 234 Ala. 639, 176 So. 477, Justice Brown of the Supreme Court of Alabama, in writing the opinion of the court on motion for rehearing, stated:

"It is well-settled that the right to reclaim money voluntarily paid to the State or to the counties thereof, as taxes, is a creature of legislative grace which the legislature may restrict or limit by future legislation. First National Bank of Scottsboro v. Jackson County, 227 Ala. 448, 150 So. 690."

In the Jackson County case cited by Justice Brown, Justice Gardner deals at length with a statute amending a former act which permitted recovery for taxes paid under mistake to limit the period of recovery to one year instead of the six years previously allowed. The court says:

"Plaintiff's last payment was made January 20, 1931. The present action was commenced on October 11, 1932. As originally enacted, the statute permitted a recovery within six years from the date of payment. Section 3146, Code of 1923. But by the Act approved July 28, 1931 (General Acts 1931, p. 811), this section was rewritten with the single change of a substitution of one year in the place of six for the commencement of the suit, and it appears the present suit was brought more than one year after the approval of the amendatory act. This section and the two preceding constituted one act (General Acts 1907, p. 639), and were codified therefrom.

"A county is a mere political subdivision of the state, and no right to a suit against it exists except by statute. Ex parte State, 52 Ala. 231, 23 Am. Rep. 567; Hamilton v. Jefferson County, 209 Ala. 517, 96 So. 628. Prior to the enactment of what is now section 181 of the Code of 1923, the county was not subject to suit, and since that time and prior to the enactment here in question, any such suit was subject to the limitations of the present Code, section 228. Lowndes County v. Hunter, 49 Ala. 507.

"By the Act of 1907 (sections 3144-3146, Code 1923), therefore, the Legislature granted to taxpayers, who paid their taxes under an invalid law, a new privilege or benefit, for prior thereto no action would lie for taxes voluntarily paid. Raisler v. Mayor, etc. of Athens, 66 Ala. 194; Gachet v. McCall, 50 Ala. 307.

"As said in Luke v. Calhoun County, 56 Ala. 415: 'The legislature has full power to take away by statute rights, not vested, which have been conferred by statute.' See, also, Blake v. State, 178 Ala. 407, 59 So. 623. And speaking of the repeal of a statute conferring a right to sue the state, the court, in Ex parte State of Alabama, 52 Ala. 231, 23 Am. Rep. 567, said: 'Such statutes are matters of grace, confer privileges,—they do not create rights. * * The power to withdraw is commensurate with the power to confer, and when the privilege is withdrawn, the citizen is remitted to the condition in which he stood when it was conferred.'

" 'When a right given by statute is not by nature a vested right and at the time of the repeal of the statute is still inchoate * * * it will fall with the statute, unless expressly excepted.' 59 Corpus Juris 1188.

"Illustrative of this general rule is the case of Ex parte State of Alabama, 52 Ala. 231, 23 Am. Rep. 567, where it was held that the repeal of

the law authorizing suits against the state strips a court, in which such a suit is pending, of all jurisdiction to proceed further in the cause, and wherein was quoted with approval the following expression from Beers v. State of Arkansas, 20 How. 529, 15 L. Ed. 991: 'This permission (to sue the State) is altogether voluntary on the part of the sovereignty; it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.'

"So in the instant case the Legislature has granted to the taxpayer a new privilege to sue the county under such conditions and restrictions, among them, as originally enacted, a requirement that the suit be brought within six years. But the amendment in the Act of 1931 changes this period to one year, and we think the amended act is here to be construed as if the statute has been originally enacted in this amended form. 59 Corpus Juris 1096.

"There is here no element of contract involved, for, as said in Alabama v. United States, 282 U. S. 502, 51 S. Ct. 225, 226, 75 L. Ed. 492; 'Levying a tax does not create a contract. It is a unilateral act of superior power, not depending for its effect upon concurrence of the party taxed.' Differently expressed is the same thought in State v. Fleming, 112 Ala. 179, 20 So. 846, 847, cited approvingly in Turner v. State, 226 Ala. 269, 146 So. 601; 'In one sense, there is no element of contract in taxation, in that the taxing power imposes the tax and enforces its collection whether the party taxed assents or dissents.' True, in a proper case, recovery may be had in an action for money had and received (Ward v. First Nat. Bank, supra), or in a civil action as for a debt (Turner v. State, supra). But this relates to a matter of remedy only and affords no foundation for the insistence that plaintiff here has been deprived of any vested right or that the application of the amended act to its case in any manner impairs the obligation of a contract.

* * *

"Plaintiff's right of recovery rested merely upon the privilege granted by the Legislature, which privilege was subject to be taken away or modified as the lawmaking body saw fit and without infringement of any constitutional right."

In my opinion, the doctrine set out above has a direct bearing on the matter here under consideration. It follows, therefore, that the statute of limitations with regard to the time for presenting and claiming witness fees being a matter of legislative grace under the authority above quoted, it may be changed by any future enactment. It is, therefore, my opinion that the act approved February 16, 1939, applies to all outstanding witness claims in civil cases which have not been presented for payment. Opinion to Hon. Sam Drinkard, Ex-Sheriff, Marengo County, Linden, Alabama, under date of May 8, 1939.

In answer to your inquiry number 2, it is my opinion that the county depository is required to pay into the Fine and Forfeiture fund of the county on January 1st of each year all witness fees in its hands which are shown by the clerk's report to have been collected and subject to disbursement for three years. This, as you see, is upon the authority set out in answer to your inquiry number 1.

In answer to your third inquiry, it is my opinion that all witness fees that come within the scope of Section 7245, as amended, are barred after three years from the time such fees are collected by the clerk and subject to disbursement. However, in those cases where the witness fee is payable by the county through the fine and forfeiture fund under authority of Section 3763, Alabama Code of 1923, the witness claim may be registered with the county treasurer or depository under authority of Section 3766, Alabama Code of 1923. After these claims are so registered, they are never barred. Opinion to Hon. H. W. McKenzie, Treasurer, Marion County, Hamilton, Alabama, under date of June 19, 1939, a copy of which is enclosed.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 19, 1939.

Hon. Edgar Underwood,
Judge of Probate,
Franklin County,
Russellville, Alabama.

Counties—Not authorized to purchase electric fan for Judge of Probate's office.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of August 1, 1939, which is as follows:

"We desire to purchase an electric fan for the office of the Judge of Probate of this county. The fan is contained in a cylinder guard with convex top that spreads the air when forced against it by the fan rotating in a lateral position. The fan is portable, is placed on a large desk, where the employees work on either side, and serves the whole office without annoyance. This fan is much better and more economical than a ceiling fan.

"May the county purchase the fan and pay for the same from the county treasury?"

I am of the opinion that your inquiry should be answered in the negative. It is a well established rule of law that money cannot be expended by the county unless there is a direct statute authorizing such expenditure, and I have been unable to find any law authorizing the county to purchase electric fans for any county officer. In reaching this conclusion, I have carefully considered Section 9604 of the Alabama Code of 1923, and Section 231, Subsection 3, as amended by the Acts of 1935, page 990. These sections are as follows:

"Section 9604. Stationery of officers paid for by county.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses, for suitable books, stationery, postage stamps, used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

"3. Claims for necessary stationery and office supplies, including typewriters and supplies and telephones and telephone services, for offices of the Probate Judge, Clerk and Register and Court Reporters and Tax Collector; and claims of the Secretary of State for certified copies of field notes."

It is clear that an electric fan could not come within the provisions of Section 9604, supra, and it is my opinion that an electric fan is not a necessary office supply within the meaning of Section 231, Subsection 3, supra.

I further call your attention to an opinion rendered to the Judge of Probate, Monroe County, Monroeville, Alabama, on September 30, 1930, Biennial Report of Attorney General, 1928-30, page 981, which opinion holds that a county cannot purchase an electric fan for the Probate Judge's office.

There should be legislation enacted to remedy this situation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 19, 1939.

Mrs. Mary H. Fowler, Supt.,
State Training School for Girls,
Box 38, East Lake,
Birmingham, Alabama.

Juvenile delinquents—

Juvenile and Domestic Relations Court of Montgomery County retains complete custody and control of delinquent girls committed to the State Training School for Girls and may from time to time make such orders regarding the custody of such girls as in its judgment seems proper (General Acts, 1931, p. 132, section 10).

Opinion by Assistant Attorney General Loeb.

Dear Madam:

I have your letter of August 12, 1939, in which you request my opinion as follows:

"Re: Hall, Hazel, Committed: 5-2-39

"We have recently received an order of release from Judge Wiley C. Hill, Jr., Montgomery Juvenile Court, on the above named girl.

"I have been instructed by our Executive Committee to ask you to clarify this situation for us. As you know we receive a few of these released, from time to time, and usually take each case into the Circuit Court in Jefferson County on its individual merits. Your office has been most helpful in conducting these cases, and in all cases which are incomplicated by other factors, the school has retained custody of the girl.

"The case in question is, in our opinion, an incomplicated case, and presents no unusual factors. It would, we think, be very simple to carry the matter to the Circuit Court. The child is definitely delinquent and would benefit from a further stay in the school.

"However, the Committee feels that perhaps there is an interpretation of the law which would make individual action in each case unnecessary. In other words, **DOES THE SCHOOL HAVE THE RIGHT, BY LAW, TO RETAIN CUSTODY, or, DOES THE JUDGE HAVE THE RIGHT, BY LAW, TO REGAIN CUSTODY AND PLACE HER AGAIN IN THE CUSTODY OF HER PARENTS, AFTER A FINAL ORDER OF COMMITMENT TO A STATE INSTITUTION HAS BEEN MADE?**

"We think that if it is thoroughly within the law to release this case, or any subsequent case, we want to obey that law instantly, without considering other factors, such as the school would naturally take into consideration. If there is any question about the final disposition of the child remaining with the school after such order of commitment, we want to continue our present plan of trying to decide each case upon the individual factors in the case.

"We have followed our usual procedure in this case, and have taken the matter to a meeting of the Executive Committee, in the meantime, holding the child against the order of release. The Executive Committee has asked me to refer the matter to your office, and to ask Judge Hill to hold the matter in abeyance until a decision can be reached.

"Since your office has been most helpful in clarifying many points for us, we ask your assistance again, and shall be most happy to follow your interpretation of this point of law."

In my opinion, it is your duty to comply with the order of the Juvenile and Domestic Relations Court of Montgomery County.

The Juvenile and Domestic Relations Court of Montgomery County now operates under Act No. 70, approved February 26, 1931, as amended (General Acts, 1931, p. 132). Section 10 of said act authorizes the court to commit any delinquent white girl to the State Training School for Girls and provides as pertinent:

"During the probation period, and during such time when such children shall be committed to any institution or to the care of any society or association or person for custodial purposes, such children shall be subject to personal visitation of such probation officer or other agent

of said courts as may be appointed for what purpose; **and any final order or judgment of the court in the case of any such child shall be subject to modification from time to time as the court may consider best for the welfare of the child, and no commitment of any such child to any institution or other custodial agency shall deprive the said courts of the jurisdiction to change the form of the committment or transfer the custody of the child to some other institution or agency on such conditions as the court may see fit to impose during the minority of said child.** The duty being constant upon the court to give to such child subject to its jurisdiction such oversight and control as may conduce to the welfare of said child and the best interest of the State; and said court may at any time by order enter upon the records of said court relieve or discharge any such child from custody or control in which it may at such time, subject to be retained and put in control or custody on failure to comply with the terms and conditions that may be prescribed in said order of the court." (Emphasis supplied)

The foregoing section ineluctably impels the conclusion that the Montgomery court retains jurisdiction over the delinquent girl at all times and may make such orders as it sees fit regarding her custody and control without regard to the authority of the custodial agency into whose care such girl has been committed.

It is true that Section 668 of the Alabama School Code of 1927 provides that girls committed to the State Training School for Girls shall be kept there until reaching the age of twenty-one "unless parole or discharge thereon by order of the parole committee of which the Superintendent shall be a member." Even assuming that Section 668 is in conflict with Section 10 above quoted, we need look no further than the language of Section 10 to ascertain that its effect is to deprive the State Training School for Girls of control over a delinquent girl committed to it, where such control conflicts with the powers granted to and exercised by the Juvenile and Domestic Relations Court of Montgomery County.

You are, therefore, advised that such court has the right under the law to regain custody of any child committed to your institution and to place such child again in the custody of her parents or make such other disposition of such child as the court in its judgment deems fit and proper, even though a final order of commitment to a state institution has been made.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 21, 1939.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Refund of Excise Taxes—Taxpayer has twelve months from the time of payment of the taxes to file petition with the Department of Revenue for refund of excise taxes paid through mistake or error. Refunds paid out of current collections.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 8, 1939, in which you request my opinion as follows:

"An opinion is requested in regard to authority of the State Department of Revenue for making refunds of excise tax:

"First, in case the excise tax was paid in error and distributed to the cities and counties as provided by law on September 1, does the State Department of Revenue have legal authority to make a refund of such tax from current funds collected and held for future distribution?

"Second, does the State Department of Revenue have authority to make a refund of excise tax paid in error by the taxpayer from current undistributed funds, if a petition supported by a corrected return acceptable to the Department is filed before the distribution is made to the cities and counties?

"In order that the matter may be fully understood, the instant case is related as follows:

"A financial institution subject to the excise tax under Article XII, Chapter 1 of the 1935 Revenue Act, filed returns for the years 1935, 1936 and 1937. The returns as verified by preliminary audit showed tax liability by years: 1935, $967.31; 1936, $1,896.69; 1937, $352.76. At the time the petitions were filed the collections for the years 1935 and 1936 had already been distributed to the cities and counties, said distributions having been made on September 1, 1936 and September 1, 1937, as provided by law. The distribution of the tax collected for the year 1937 had not been made at the time the petition was filed prior to September 1, 1938.

"In the event it is held that the State Department of Revenue has no authority to make refunds from current collections held for distribution September 1, 1939, it will be appreciated if you will advise what recourse the taxpayer has, if any,

"(a) in regard to the two petitions which were filed after the distribution was made; and

"(b) in regard to the petition filed June 16, 1938 for the year 1937 before the distribution was made."

The matter of refunds of taxes or licenses which are paid directly to the State Tax Commission or Department of Revenue as set out in the General Acts of the Legislature, 1931, pages 527, 528, is as follows:

"Section 2. Before any refund under this Section can be made the taxpayer, his heirs, successors or assigns, shall file in duplicate, petition directed to the State Tax Commissioner setting up the fact relied on to procure the refunding of the money erroneously paid. Such application must be made within twelve months from the date of such payment.

"Section 3. The State Tax Commissioner shall examine said petition and the records of the State Tax Commission, and if the facts set forth in the petition are such as to entitle the petitioner to the refunding of the money as prayed for and the State Tax Commissioner upon the evidence adduced is satisfied that the petitioner is entitled to the refund as prayed for, he shall so certify to the Auditor, stating the amount to be refunded by the State, the particular fund on which such warrant shall be drawn and forward to the Auditor copy of the petition with the certificate attached, and if the Auditor shall be satisfied that the petition is in form required by law, he shall draw his warrant on the State Treasurer as hereinbefore provided for the amount certified to him by the State Tax Commissioner."

You will note that the application for refund must be made within twelve months from the date of payment. Therefore, the applications for refund for 1935 and 1936, not having been filed within twelve months, are barred and the taxpayer has no other recourse. See **Casmus v. Lee,** 236 Ala. 396, 183 So. 185; Biennial Report of Attorney General 1936-38, p. 753; Opinion of the Attorney General to Hon. John C. Curry, June 20, 1939.

The application for refund for 1937 taxes having been filed with the State Department of Revenue within the time required by law, the State Department of Revenue has the authority to make the refund out of current collections.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

August 21, 1939.

Hon. W. S. Welch,
Chairman Judiciary Committee,
House of Representatives,
State Capitol.

1. Local bill providing allowance for traveling expenses to official court reporter not violative of subsection 24 of Section 104 of the Constitution of Alabama, 1901.

2. Local bill providing for an increase of the ex-officio fees of a circuit clerk unconstitutional as violative of Sections 96 and subdivision 24 of Section 104 of the Constitution of Alabama, 1901.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion under date of August 15, 1939, which is as follows:

"Under authority of Section 853 of the 1923 Code of Alabama, I, as Chairman of the Judiciary Committee of the House of Representatives, request your opinion on the following:

"(1) Section 6739 of the Code of 1923 fixes the salary of the Court Reporter, and prorates the salary among the counties of the circuit for payment. A local bill is under consideration which provides for an allowance of $300.00 per annum for the traveling expenses of the court reporter to be paid by the counties in the circuit in the same proportion as the salary of the court reporter is paid. In view of subsection 24 of Section 104 of the Constitution of Alabama, is such local law valid?

"(2) Section 7280 of the Code of 1923 fixes the ex-officio fees of the circuit clerks. A local bill is under consideration which provides for an increase of these ex-officio fees in the counties of the circuit. In view of subsection 24 of Section 104 of the Constitution, is such a local law valid? (This particular inquiry relates to the ex-officio fees of the circuit clerk of Bullock County.)"

In reply to your first inquiry, it is my opinion that the same should be answered in the affirmative.

Section 104, subdivision 24 of the Constitution of Alabama, 1901 is as follows:

"The Legislature shall not pass a special, private or local law in any of the following cases:

(20) creating, increasing or decreasing fees, percentages or allowances of public officers."

It will be noted that the above quoted section, supra, is applicable only to the creating, increasing or decreasing fees, percentages or allowances of public officers. As stated in your letter, the local bill under consideration specifically provides an allowance for traveling expenses of an official court reporter and therefore the only question presented is whether or not an official court reporter is a "public official" within the contemplation and purview of the above section, supra. If an official court reporter is a "public officer" within the contemplation and purview of section 104 (24) supra, then the local act in question would clearly be unconstitutional. However, if an official court reporter is not a "public officer" within the contemplation and purview of section 104 (24), supra, then, said local bill would not be unconstitutional or invalid as violative of said constitutional provision.

Section 6733 Code of Alabama, 1923, makes provision for the appointment and necessary qualification of official court reporters and further provides as follows:

"Said official court reporter shall be an officer of the court, and within his circuit shall be and have powers to administer oaths, and shall hold office at the pleasure of the judge, who shall have power to remove said official reporter at any time."

It will be noted that the above quoted portion of Section 6733, supra, expressly makes the official court reporter an officer of the court, however, this does not in and of itself make an official court reporter a "public officer." The Court of Appeals of Alabama in the case of **Stone, County Treasurer, v. State, ex rel. Strain,** 18 Ala. App. 228, 89 So. 824, in construing an act which increased the compensation of official court reporters in circuits having three judges, which act was attacked as being violative of Section 281 of the Constitution of Alabama, 1901, said:

"Nor in our opinion is petitioner an officer within the contemplation of Section 281 of the Constitution. Taking the acts of the Legislature upon the subject of official court reporters, and construing them in their entirety, there is no difficulty in concluding **that the Legislature never intended to clothe the position of court reporter with the functions and attributes of an officer. A court reporter is an employee or an attache' of the court without any of the characteristics of an office holder under Section 281 of the Constitution. Harrington v. Van Hayes, 200 Ala. 430, 76 So. 422.**"

From a reading of the above quoted excerpt, supra, it will be observed that the Court of Appeals of Alabama was of the opinion that an official court reporter is not clothed with the functions and attributes of an officer but is only an employee or attache' of the court. The opinion of the Court of Appeals in the case of **Stone, County Treasurer, v. State ex rel. Strain, supra,** was based upon an opinion of the Supreme Court of Alabama rendered in the case of **Harrington v. State, ex rel. Van Hayes,** 200 Ala. 480, 76 So. 422, wherein the legal meaning of the words "office," "officer" and "public officer" were considered. Mr. Justice Bouldin in delivering the opinion of the Court said:

"There are in legal parlance probably few words that have a greater variety of meanings, or shades of meaning, than the words 'office' and 'officer.' Officers are divided into private and public, civil and military, national, federal, state, county, municipal, and many other classes of territorial designation; and into many other subdivisions and classifications, such as eleemosynary, health, and quarantine. When we speak of a public officer as a state, county, or municipal officer, we usually mean a person who, by lawful authority, has been invested with a part of the sovereign functions of government. **A public office is, of course, a public employment; but every public employment is not a public office. The portion of the sovereign power thus delegated to the officer may belong to any of the three governmental departments; that is, legislative, executive, or judicial. A public agent or employe, of course, acts for his principal or employer. A public employment may be created by law, or by contract; but a public office can never be created by contract. Public officers are usually required to take an oath, and often, to make bond, and to keep an office or place of business; but none or all of these requirements do not absolutely determine whether or not a given employment is a public office, within the meaning of a given statute or constitutional provision.** This is well stated, verified, and illustrated by notes and cited authorities in all the text-books on the subject of public officer. See Mechem on Pub. Secs. 1-10, and Throop on Pub. Off. Secs. 1-15. **A public employment authorized or created by law may not be a public office within the meaning of the statutes and constitutional provisions governing qualifications for, elections to, and removals from, public offices, state, county, or municipal; or within the meaning of constitutional provisions prohibiting increasing, diminishing, or changing the compensation of officers during their respective terms; and yet it may be that of a member of some board or commission or court or other body clothed by law with a part of the sovereign powers, and for that reason be deemed a public officer within the meaning of the statute of its creation.** An illustration of this may be found in the case of State v. Sanders, 187 Ala. 79, 65 South. 378, L.R.A. 1915A, 295, and others, in the employments of the president of the University of Alabama, and of other state institutions, and in the positions of clerks and assistant clerks of the house of representatives, secretary and assistant secretaries of the senate, and of the engrossing and enrolling clerks of both houses of the Legislature. The incumbents of these positions are all officers, but officers of the respective bodies or

tribunals which select or appoint them, and not of the state within the meaning of section 1467 of the Code, and of many of the constitutional provisions relating to public officers of the state, the counties, and the municipalities."

We observe from a careful study of the above quoted excerpt, supra, that it was evidently the opinion of the Court of Appeals in the case of **Stone, County, Treasurer, v. State ex rel. Strain, supra,** that an official court reporter could not come within the term "office," "officer" or "public officer" as defined by the Supreme Court in the Harrington case, supra, as there is no delegation to an official court reporter of any of the sovereign functions of government, to be exercised by him for the benefit of the public. A review of the decisions of sister states leads us to the conclusion that the Court of Appeals was justified in rendering the decision so rendered in the case of **Stone, County Treasurer, v. State ex rel. Strain, supra,** upon the holding of our Supreme Court in the Harrington case, supra. In the case of **Robertson v. Ellis County,** 84 S. W. 1097, 38 Tex. Civ. App. 146, the Court of Civil Appeals of Texas in considering the question as to whether or not official stenographers in district courts were "public officers" within the meaning of the Constitution of Texas said:

"Now, while the fact that the position of stenographer is designated in the act providing for its creation as an office, and that it declares that the person who may be called to perform its duties 'shall be a sworn officer of the court,' affords some reason for determining it to be such, still it is believed the place possesses none of those sovereign functions of the judicial department of the government to which it relates, to distinguish it from a mere employment to perform a species of service, under public authority, for the assistance and convenience of the court and parties litigant therein, in which no judicial discretion or judgment is involved. The creation of the position, as shown by the very terms of the act, was designed for no other purpose than to provide some one by whom the oral evidence offered, and other proceedings involving objections made to admissibility of testimony, the ruling of the court, and exceptions thereto, might be taken in shorthand, as a method of preserving those matters as they occurred, without delaying trials, to be afterwards transcribed and furnished the court and parties to the suit, to aid them in an accurate and prompt preparation of the record. The report or transcript of the proceedings by the stenographer is not binding, however, upon the county, and may be adopted or rejected at his discretion. No act which he is authorized to do is independent of the control of others, or vested in him as a supreme power to be exercised as a right or prerogative of a judicial office. We conclude that while the position of a stenographer, under the statute in this state, may be, in a sense, an office, and the term thereof may continue for a longer period than two years, yet there is no such sovereign function of government embraced in the powers conferred upon the individual performing its duties as brings it within the meaning of the word 'office' as used in the section of the Constitution quoted."

From a reading of the case of **Robertson v. Ellis County, supra,** it will be observed that the official stenographer in Texas is provided for by law very much in the same manner as official court reporters are created in Alabama. It will further be observed that the holding in said case and the above quoted excerpt therefrom was founded upon reasoning very similar to that used by our Supreme Court in the Harrington case, supra, and upon which the Court of Appeals relied as authority for its opinion in the case of **Stone, County Treasurer, v. State ex rel. Strain, supra.**

We find that other states have passed on a question similar to the one here involved. In **Tipton v. Sands, 60 Pac. (2) 622,** The Supreme Court of Montana, said:

> "Furthermore, the Supreme Court reporter is not an office within the meaning of Section 35, article 8, above, as it lacks one of the elements of a public office, as defined by this court in the cases of State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583, and State ex rel. Nagle v. Page, 98 Mont. 14, 37 P. (2d) 575, in this: That the position does not possess a delegation of a portion of the sovereign power of the government, to be exercised for the benefit of the public."

In **State ex rel. Appleman v. Conley,** 178 N. E. 207, 124 Ohio State 265, the Supreme Court of Ohio in 1931 held that the official stenographer of the Court of Common Pleas of Richland County Ohio was not a public officer.

Therefore, it is my opinion, based upon the foregoing authorities, that an official court reporter is not a "public officer" within the contemplation or purview of section 104 subdivision (24), supra, and that the local act being considered by you would not violate section 104, subdivision (24) of the Constitution of Alabama, 1901.

I answer your second inquiry in the negative.

It is my opinion that a local bill which increases the ex-officio fees of a circuit clerk is unconstitutional as violative of Sections 96 and sub-division 24 of Section 104 of the Constitution of Alabama, 1901. Said sections, supra, are as follows:

> "Section 96. The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

> "Section 104. The legislature shall not pass a special, private or local law in any of the following cases:

> (24) Creating, increasing or decreasing fees, percentages or allowances of public officers."

In the case of **Vaughn, Probate Judge, v. State ex rel. Barker,** 212 Ala. 461, 103 So. 38, it was held "that ex officio fees of circuit clerks, as known in 1901 and known now, are among the fees and allowances named in Section 96." It was further held in substance that an act regulating ex officio fees of clerks of circuit courts which was not applicable to all the counties in the State was violative of Section 96 of the Constitution, supra, as said section prohibits the enactment by the Legislature of any law not applicable to all counties in the State regulating costs and charges of courts or fees, commissions or allowances of public officers.

It is further my opinion that this is an allowance or fee to a public officer within the inhibition of sub-section 24 of section 104 of the Constitution, supra, See **Osborne v. Henry,** 200 Ala. 353, 76 So. 119.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

August 23, 1939.

Hon. J. H. Sims,
Judge of Probate,
Bullock County,
Union Springs, Alabama.

Probate Judges—Insane Persons—Guardian and Ward—

Probate Judge held not authorized to accept payment on $1,000.00 award to a person of unsound mind, under the provisions of Section 8251, Code of Alabama of 1923, as amended.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of June 28, 1939, in which you request my opinion as follows:

"JUDGE OF PROBATE CUSTODIAN OF FUNDS OF MINOR OR PERSON OF UNSOUND MIND, NOT EXCEEDING TWO HUNDRED DOLLARS: DISBURSEMENT OF SAME.

"Under the above caption and Sections 8250 to 8254 thereafter, the Probate Judge has been accepting funds at the rate of Seven Dollars each half month for a former employee of the Works Progress Administration, who was injured on September 29, 1937, while employed on a W. P. A. Project in the State of Alabama, and as a result of said injury an award was made to this employee in the amount of One Thousand Dollars ($1000.00). The award reads as follows:

" 'You have, therefore, been awarded compensation on account of the permanent disability, from March 1, 1938, to February 13, 1944, inclusive, at the rate of Fourteen Dollars ($14.00) per month. If you should die during this period the award would then terminate. The sum of Seven Dollars ($7.00) is being certified to the U. S. Treasury for payment of compensation for the period of April 16, 1939, to April 30, 1939, inclusive. A check should reach you within three weeks after April 30, 1939. Further payments of compensation will be made to you at the rate of Seven Dollars ($7.00) each half month.'

"On the basis of the award mentioned above and under Sections 8250 to 8254 of August 17, 1923, Code of Alabama, the Probate Judge has been accepting the payments described in the award and has been disbursing such payments to the interest and for the benefit of the former Works Progress Administration employee.

"The reason for such award as described above is that the medical doctors for the Government have found the former employee of unsound mind and such evidence has been accepted by the Probate Judge as sufficient evidence to justify his acceptance of the semi-monthly payments described above. Furthermore, since there has been no payment at any time in excess of Two Hundred Dollars ($200.00), nor has there at any time been in the possession of the Probate Judge an amount in excess of Two Hundred Dollars ($200.00) for the benefit of this person

of unsound mind, the Probate Judge is of the opinion that he is legally handling such funds for this person of unsound mind even though the former Works Progress Administration employee has not been legally declared insane, and even though the total amount of the award will exceed Two Hundred Dollars ($200.00) eventually but there is no likelihood of the Probate Judge having in his possession at any one time an amount equal to, or in excess of, Two Hundred Dollars ($200.00).

"In view of the above the Probate Judge desires that the following questions be answered by the Attorney General for the State of Alabama, and it is the purpose of these questions to clarify the Probate Judge's position in the above matter and also to clarify the position of the Grantor, or Payor, of the funds due on the above award, as follows:

"1. Is Probate Judge authorized to accept any payment of any funds when there has been a definite award made in the amount of One Thousand Dollars ($1000.00) to an insane person, but such award is payable at the rate of only Seven Dollars ($7.00) per half month and the payment is contingent upon the condition that such insane person lives and the award is terminated either when the total amount has been paid or upon the death of the insane person, or upon the recovery of the insane person?

"2. Is the grantor or payor of an award in excess of Two Hundred Dollars ($200.00) relieved when such award is paid to the Probate Judge at the rate of Seven Dollars ($7.00) per half month according to the terms of the award and when no payment at any time has been equal to or has exceeded the sum of Two Hundred Dollars ($200.00)?

"3. Is it necessary for the Probate Judge to be convinced by merely satisfactory medical testimony that a person is of unsound mind or insane before he can act as the custodian of funds of a person of unsound mind, not exceeding Two Hundred Dollars?

"4. Is it necessary that the Probate Judge ascertain by Inquisition Proceedings that a person is of unsound mind or insane before he can act as the custodian of not to exceed Two Hundred Dollars ($200.00) for such person of unsound mind?

"5. What is the Statutory Limitation of the funds that a Probate Judge may handle for a person of unsound mind under Article 11, Sections 8250 to 8254 of the August 17, 1923, Code of Alabama, when

"(a) The payments to said Probate Judge are made at the rate of Seven Dollars ($7.00) per half month

"(b) The title of the money does not pass to the person of unsound mind until the money is actually received by said Probate Judge

"(c) The amount of any one payment is less than Two Hundred Dollars ($200.00)

"(d) The total amount of money in the possession of the Probate Judge for the benefit of the person of unsound mind does not at any time equal Two Hundred Dollars ($200.00)

"(e) The Probate Judge is the Custodian of Funds for a person of unsound mind merely for the purpose of conserving such funds and the fund so handled does not at any one time exceed the sum of Two Hundred Dollars ($200.00)

"(f) The Probate Judge is the Custodian of Funds for a person of unsound mind, not to exceed Two Hundred Dollars at any one time, for the purpose of defraying the actual and necessary expenses of such person

"(g) The Probate Judge is accepting payments at the rate of Fourteen Dollars per calendar month, such payments being made as credits upon an award of One Thousand Dollars payable at the rate of Seven Dollars per half month and such payments are contingent upon the status quo of the person of unsound mind, namely

(1) that he does not recover and become sane and

(2) that he continues to live

for the benefit of a person of unsound mind

"(h) The payments to the Probate Judge are made for the express purpose of relieving the Creditor of the person of unsound mind when such Creditor is indebted to the person of unsound mind in the amount of One Thousand Dollars and said sum is to be expressly paid at the rate of Seven Dollars each half month and no more, and at no time has there been, or will there be, due any payment in excess of Two Hundred Dollars.

"6. What is the general purpose of Sections 8250 to 8254 of Article 11, of the August 17, 1923, Code of Alabama?

"(a) Isn't it the purpose of these Sections to relieve the Probate Judge of the expense and necessity for holding Inquisition Proceedings in cases when a resident of his County is entitled to a sum of money not exceeding in amount Two Hundred Dollars?

"(b) Isn't it the purpose of these Sections to authorize the Probate Judge to conserve, in so far as possible, any funds not in excess of Two Hundred Dollars, that may be due to a person of unsound mind, which person is residing in the County presided over by said Probate Judge?

"(c) Isn't it the purpose of these Sections to authorize the Probate Judge to use his best judgment in determining what cases he shall or shall not handle funds for in so far as their insanity is concerned or in so far as their status of persons of unsound mind is concerned?

"(d) Isn't it the purpose of these Sections to authorize and permit the Probate Judge to act as the Custodian of Funds due a person of unsound mind when such funds at no one time exceed Two Hundred Dollars?

"(e) Isn't it the purpose of these Sections to authorize the Probate Judge to satisfy himself that the person for whom he is the Custodian of Funds not in excess of Two Hundred Dollars is of unsound mind or insane and is not capable of handling his own funds to the best interests of such person?

"(f) Isn't it the purpose of these Sections to authorize the Probate Judge to be the Custodian of funds for a person of unsound mind and to authorize such Probate Judge to both receive and disburse such funds to the interest and advantage of such person of unsound mind when such funds at no time are in excess of Two Hundred Dollars and this without the necessity of Inquisition Proceedings in order to determine legally that such person is of unsound mind or insane?

"7. Under Articles 2 to 4, Sections 8103 to 8135, may the Probate Judge pay for all expenses of having a person of unsound mind declared legally insane if such person has an income of Fourteen Dollars ($14.00) per month and has no other estate in excess of $100.00? The estate in this particular case has been created as a result of the act that caused, either directly or indirectly, the person in question to become insane or of unsound mind, had this small award of Seven Dollars ($7.00) each half month not been made in favor of the person of unsound mind by an Agency of the Federal Government, then the person would, no doubt, have been classed as a pauper and the County would have been obligated for all costs of Inquisition Proceedings, including the fees for Jury, Sheriff, Attorneys, Probate Judge, etc."

In reply, I wish to advise that in my opinion your first question should be answered in the negative.

Section 8251 of the Code of 1923, as amended by the General Acts of 1935, page 36, provides as follows:

"8251. The funds of a minor or person of unsound mind, not having a general guardian; not exceeding in amount two hundred dollars, may be paid to the Judge of Probate of the county in which said minor or person of unsound mind resides, if a resident of the State, or if a non-resident, to the judge of probate or like officer of the County in which the debtor or creditor resides; and the person from whom said sum is due may discharge himself by making such payment."

You will note that the limitation set in the above quoted statute definitely limits the amount that a probate judge may accept for a person of unsound mind, to two hundred dollars. The amount of the award in the instant case is far in excess of two hundred dollars. It is true that the payment of the award is in small payments, but in my judgment this cannot change the fact that it is possible for the probate judge to receive far in excess of two hundred dollars from this award.

In my judgment, the legislature did not intend an estate whose ultimate limit is one thousand dollars, even though paid in small payments, to come within the provisions of this statute.

I wish to further refer you to an opinion of the Attorney General addressed to Hon. G. H. Howard, Judge of Probate, Elmore County, under date of April 12, 1935, and reported in the Biennial Report of Opinions of the Attorney General for 1934-36, page 140.

Since the answers to your other questions are predicated upon the answer to your first question being in the affirmative, the necessity of answering your other questions is removed by my reply to your first question.

Yours very truly,

THOMAS S. LAWSON,
Attorney General,

August 25, 1939.

Hon. Frank M. Dixon,
Governor of Alabama,
Capitol.

Booth Act (Act No. 244, approved August 18, 1939), relative to method of acquisition of electrical facilities by certain named agencies, held not applicable to proposed Jefferson County hospital or to State educational institutions at Jacksonville, Florence, Troy, and Montgomery, Alabama.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 25, 1939, requesting my opinion as follows:

"You are respectfully referred to Act No. 244, approved August 18, 1939, and commonly referred to as the 'Booth Act,' and respectfully requested to advise me whether this act has any bearing on the projects mentioned in the telegram from P.W.A. Administrator John M. Carmody, copy of which I am herewith enclosing."

The telegram, copy of which you enclosed in your letter, is as follows:

"Prior to the passage of Senate Bill 300 I expressed to you and to others my concren that the passage of such bill might force the cancellation of many Public Works Administration commitments on Alabama projec's because of the long and expensive litigation, or because of the resulting uncertainty that Alabama and its public agencies could carry out their agreements with the Federal government through the Public Works Administration. At the same time, I expressed my hope that you would find it convenient to present my observations to the Legislature before it proceeded further with Senate Bill 300. I have just received a certified copy of Senate Bill 300 as passed by the Legislature and approved bv you. And such bill appears to have been passed and approved in the same form as when my concern was expressed.

"The press has quoted you as stating that Senate Bill 300 would in no way interfere with previous commitments of the Public Works Administration, but I fail to find any such assurance in the bill.

"The procedure and action specified by the bill is required, to quote the applicable portion of Section One, 'Whenever any . . . governmental agency . . . proposes to engage in the business of . . . furnishing electric service for . . . consumption and . . . there is then in existence within the territory . . . a plant or distribution system, either or both or any part or parts thereof, furnishing the service so proposed to be furnished by such agency.' I presume that the projects of the State Board of Education expected to be financed by loans and grants from the Public Works Administration and including a dormitory, gymnasium and swimming pool and a library building for the State Teachers' College at Jacksonville, a physical education building at State Teachers' College at Troy, and a Science and Health Education Building at State Teachers' College for negroes at Montgomery include facilities for furnishing electric service for consumption of the students and that the charge for such service is included in the fees, rents or charges to be paid by the students for the

use of the projects. In the circumstances, I must withhold the advancement of additional funds for these projects until I know just what facilities are included in such projects for furnishing electric service for consumption of the students, and what plans you have for complying with Senate Bill 300 is not applicable.

"The hospital project at Birmingham for Jefferson County seems to involve a similar problem and similar questions are being telegraphed to R. H. Wharton, President of the County Commission of Jefferson County."

In my opinion, it is not conceivable that any of the schools mentioned, nor the Birmingham hospital, could or would be affected by the Booth Act, or could be in any way subject to its provisions.

At the outset it may be stated that the Booth Act was in its nature a remedial statute. Any construction of such act, therefore, must be that which is best suited to accomplish the general purpose thereof.

Sprowl v. Lawrence, 33 Ala. 674;

Harrington v. State, 200 Ala. 480, 76 So. 422;

R. R. Commission of Alabama v. Alabama Great Southern R. R. Co., 185 Ala. 384, 64 So. 13.

A review of the circumstances surrounding the enactment of the Booth Act clearly reveals that its main purpose was to prescribe for municipalities desiring to have public ownership of electric power plants a method of procedure. It was the legislative desire to circumvent the possibility of a municipality establishing plants for the purpose of distributing or furnishing electricity to the public where there were already in existence duplicate plants, without first seeking to acquire the existing privately owned plant.

The language of the statute itself is clear in the expression of this desire.

It is true that the phrase "or other governmental agency" found its way into both the title and into Section 1 of the act, thus possibly indicating that the legislature on final passage of the bill had prescribed conditions under which all governmental agencies, including school authorities, might engage in the business of furnishing electric service for consumption etc. However, upon more careful consideration it appears that those governmental agencies referred to in the title and in Section 1 of the act are those who propose **"to engage in the business"** of furnishing electric service for industrial, domestic or other consumption, and in no event can it be said that the schools in question of the Birmingham hospital are included among such "agencies."

By the rule of construction known as "ejusdem generis" where general words follow the enumeration of particular classes of things, the general words will be construed as applicable only to things of the same general nature or class as those enumerated. **59 C. J. 981, Section 581,** and numerous cases cited therein under note 60. Those things or instrumentalities which the legislature had in mind in enacting into law the Booth Act were municipalities, counties, improvement authorities, power districts and like territories. Certain it was that the legislature never for a moment entertained the idea that a school or a hospital would enter into the business of furnishing electricity or distributing the same.

Clearly demonstrative of this is the following sentence from Section 5 of the act:

> "If the owner fails to notify the agency of his acceptance and make tender of a deed as herein provided within the time so fixed or extended, or to comply with all other terms and conditions of the order or decree, **the agency may proceed as provided by law to construct or otherwise acquire a plant or** system within the territory where the property of such owner or any part thereof is located."

It is to be noted that authority is granted to that agency that the act affects to proceed "as provided by law" to construct or otherwise acquire a plant or system, etc. There is no provision of law authorizing a school or a hospital to construct or acquire a plant or electrical distribution system. There is a statute authorizing counties, municipal corporations, and cities to construct such systems. The so-called Carmichael Act (General Acts 1933, Extra Session, p. 100) contains specific authority in this regard. Clearly the legislature could not have intended to include schools or hospitals within the terms of the Booth Act for, if so, then certain provisions of the act, to wit, Section 5, could have no application. Indeed, if there were a provision of law authorizing a school authority to construct or otherwise acquire a plant or electrical distribution system for the purpose of furnishing electricity to the public, such statute would be unconstitutional.

Section 93 of the Constitution of 1901, which prohibits the State (and likewise any instrumentality or subdivision of the State) from engaging in work of internal improvement would have prevented the legislature from authorizing the embarkation by the educational authorities in question upon any such field of endeavor. Cf. **In re: Opinions of the Justices. Re: Establishment of the Marketing Facilities in Birmingham, Alabama, by a state agency, to wit, the State Board of Agriculture,** 187 So. 244. This, then is one conclusion which inevitably follows, that if the legislature had intended that the words "other governmental agency" be used in their unrestricted sense, i. e., to include every class of governmental agency imaginable, then the legislature would have made no mention of the other classes of governmental agencies such as municipal corporations, counties, improvement authorities, etc. Obviously, the governmental agencies which were particularly and specifically designated were those which in the contemplation of the legislature were deemed to be the agencies which had heretofore or might probably hereafter engage in the business of operating an electric light plant or distribution systems or furnishing electric service for consumption. The word "other", following the enumeration of the particular classes, is to be read as "other such like," and to include only those of a like kind or character.

Further illustrative of the conclusion that neither a school authority nor a hospital could possibly be included within the term "other governmental agency" as that term is used in the title and in Section 1 of the Booth Act are the provisions of Section 3 of the act further providing for the steps to be taken for the acquisition of the property sought to be acquired by the agency. It is to be noted that in Section 3 the following language is used:

> "Such purchases shall include such proportion of the property of the owner **within the limits of the agency** as is suitable for, and used in connection with, the generation or distribution of electricity within the agency or within the territory which the agency proposed to serve."

The words "within the limits of the agency" underlined in the above-quoted sentence can obviously have reference only to an agency such as a municipality, county, improvement authority, power district or like setup. What portion of the property of a public utility, say the Alabama Power Company, could possibly be located "within the limits" of a hospital? What portion of the property of the Alabama Power Company could be located "within the limits" of the gymnasium, library or dormitory at Florence or Jacksonville or the science building at State Normal School for the colored in Montgomery? To pose such questions furnishes the answers to the problem at hand. It was only upon those municipal corporations, counties, or districts, by whatever name called, which had well-defined boundaries, that the Booth Act undertook to impose its conditions.

It is to be concluded, therefore, that under the doctrine of ejusdem generis, neither the educational authorities in question nor the hospital project are included within the limitations or restrictions of the Booth Act.

Attention is further directed to the fact that the title of the act states that it is an act to prescribe the conditions under which the agencies mentioned might "engage in the business of furnishing electric service for industrial, domestic or other consumption," etc., and in Section 1 of the act it is made clear that such agencies must comply with the provisions of the act only when they "propose to **engage in the business** of operating an electric light plant or distribution system, or of furnishing electric service for industrial, domestic or other consumption." We cannot apprehend that when, let us say, the school located at Florence, Alabama, rents for $10.00 per month a room to be occupied by a student, which room is equipped with electric lighting facilities, that the school at Florence is **engaging in the business** of furnishing electric service for that student. The business for which Florence Normal was created and in which it is engaged is the building of the minds and bodies of the students there in attendance. Any other operations would be clearly ultra vires. It might as well be said that the school at Florence is engaged in the restaurant business merely because the students are furnished with their meals for a consideration.

The term "engaged in business" has been defined so frequently by the appellate courts of this State and by other competent authorities, that we deem it unnecessary to enter into a prolonged discussion on this point:

Rowe v. State, 19 Ala. App. 602, 99 So. 748, 749;

Harris v. State, 50 Ala. 127;

Braxton v. City of Selma, 16 Ala. App. 476, 79 So. 150;

Allgood v. Parker, 21 App. 273, 107 So. 326.

In **Rowe v. State,** 19 Ala. App. 602, the defendant Rowe was charged with assisting in the engaging in the business of hiring or soliciting laborers without a license. The court there stated that the term "engaging in business" means "that employment which occupies the time, attention and labor of the person so engaged in business." It is true that the Rowe case and the other cases cited relate to "engaging in business" as that term is used in connection with the license laws of the State but the principle which is applied in that case and others of a like nature is equally applicable here.

It may again be pointed out that the educational agencies in question could not, by any stretch of the imagination, have been intended to have been included with the agencies described in the Booth Act, for the further reason that they could not have "proposed to engage in the business of operating an electric light plant or distribution system." Section 93 of the Constitution of Alabama of 1901 provides that:

> **"The state shall not engage in works of internal improvement,** nor lend money, or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise or lend money or its credit to any individual, association or corporation."

In the **Opinions of the Justices,** 187 So. 244, hereinabove referred to, the Supreme Court, speaking through its Justices, concluded that:

> "The evil at which Section 93 of the Constitution of 1901 strikes, and the practices that gave it birth, was not the investment of public funds in things entirely public and solely for public use, but the financial profligacy with which reckless officials had, prior to the Constitution of 1875, created obligations of the State by subscriptions to the promotion of institutions and corporations supposed to serve a public purpose, but nevertheless affected with, controlled and dominated by a private interest, that brought financial disaster to the institutions and loss to the **State."**

This conclusion must have been foremost in the minds of the legislators when they enacted the Booth Act into law. Certain it is that no interpretation should be given to the Booth Act which would be tantamount to the insertion therein of an unconstitutional provision. See **McCormack Bros. Motor Car Co. v. Henry,** 232 Ala. 196, 167 So. 256.

The premises considered, it is therefore by conclusion that, under no circumstances, could any of the schools of Alabama or the Birmingham hospital engage in the sale of electricity to others within the meaning of the Booth Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General,

August 25, 1939.

Hon. J. M. Wilson,
Circuit Clerk,
Tallapoosa County,
Dadeville, Alabama.

Clerks of Circuit Courts—Fines—Agricultural Fund—

For transmitting fines for violation of agricultural laws to State Treasury for use of Agricultural Fund, clerks of circuit courts are entitled to 5% commission.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 18, 1939, in which you request my opinion as follows:

"On July 1, 1939, I forwarded the Department of Agriculture $28.50 out of a $30.00 fine from Jack Swertferger for violating Alabama's Feed Law.

"I understand from the Code, General Acts, Regular Session 1931, page 669, (s. 291-Hildreth) that I am entitled 5% Commission. Please advise me if I am legally entitled to this commission.

"I am enclosing letter from the Department of Agriculture."

I am of the opinion that your inquiry should be answered in the affirmative.

By the terms "violating Alabama's Feed Law," as used in your letter, I presume you refer to a violation of some part of Article 17 (Sections 124-137) of the Agricultural Code of 1927. Section 137 provides as follows:

"137. Misdemeanor.—Any person who shall violate any of the provisions of this Article, or the standards and regulations adopted and promulgated by the State Board of Agriculture, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than Ten ($10.00) Dollars, nor more than One Hundred ($100.00) Dollars for the first offense, and not less than Fifty ($50.00) Dollars, nor more than Two Hundred ($200.00) Dollars for each subsequent offense, **and the proceeds from such fine shall be paid into the State Treasury to the credit of the Agricultural Fund.**" (Italics Supplied)

However, if you do not refer specifically to Article 17, supra, I wish to call your attention to Section 24 of Act 13, H. 61, approved January 31, 1935 (General Acts 1935, p. 12) which is as follows:

"Section 24. That Section 484 of the 'Agricultural Code of Alabama', of 1927, be and the same is hereby amended so as to read as follows: Section 484. AGRICULTURAL FUND.—Wherever provision is made in this Code for the collection of any fee or license or the imposition of any fine or penalty for the violation of any provision of this Code without providing for the disposition of the proceeds derived therefrom, **such proceeds shall accrue to the Agricultural Fund.** The Agricultural Fund shall include all funds available from every source for the administration, enforcement or making effective the purposes of the provisions of the laws included in the Agricultural Section of this Code. **All such funds shall be paid into the State Treasury and be kept intact, liquid and in trust, subject only to the requisitions of the Department of Agriculture and Industries** and shall not be subject to any allotment or proration of appropriations for the benefit of any other department, institution or other State agency, or for any other purposes, or for use in any other manner, than as provided in Section 488 of the 'Agricultural Code of Alabama' as amended by this Act. The term 'Agricultural Department Fund', whenever used in this Code, shall mean 'Agricultural Fund'" (Italics Supplied)

In any event it appears that the fine in question is paid into the State Treasury to the credit of the Agricultural Fund.

Act No. 577, S. 291, approved July 28, 1931, (General Acts 1931, p. 669) provides as follows:

"Section 1. That the Clerks and Registers of the several Circuit Courts of the State of Alabama shall receive five per cent of any sum or sums collected by such Clerk or Register for the State of Alabama, as compensation for the collection and remittance of the same, the said percentage to be deducted by such Clerk or Register making the collection from such sum or sums collected."

In construing this act, this office has heretofore ruled that clerks are entitled to commissions on all moneys transmitted to the State. **Biennial Report of Attorney General, 1934-36, page 790; Biennial Report of Attorney General 1936-38, page 79.**

In my opinion, moneys paid by a circuit clerk to the State Treasury to the credit of the Agricultural Fund is a transmission of moneys to the State for which the clerk is entitled to his commissions. This conclusion is in accordance with opinions of this office holding the clerk was entitled to his commission on moneys transmitted to the State Treasury in cases of fines for violations of the game and fish laws and highway laws. **Biennial Report of Attorney General, 1934-36, p. 203; Quarterly Report of Attorney General, Vol. XIV, page 290.** In each of these cases, as in the instant case, the moneys so remitted are credited to a special ear-marked fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General,

August 30, 1939.

Hon. Jas. C. Brown,
Register in Equity,
Tuscaloosa County,
Tuscaloosa, Alabama.

Tuscaloosa County—Library tax and trial tax attach when case filed and docketed.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 18, 1939, in which you request my opinion as follows:

"In re: **Combined cases etc.**

"Where two cases have been filed in which the parties, complainant and parties, respondent are practically the same and it is found advisable to afterwards combine the two cases in one case, should the payment of a Trial Tax and Library fee be required in each case, or would a Trial Tax and Library fee collected in the combined case be all that should be collected in such a situation?

"I will greatly appreciate your ruling on this question at your earliest convenience."

Answering your inquiry, I call your attention to General and Local Acts of Alabama, Extra Session, 1936, p. 34 (Local Acts) which provides in part as follows:

"Section 1. That in all civil, quasi civil, criminal, quasi criminal and equity actions, suits, cases and proceedings hereafter filed in or brought by appeal, certiorari or otherwise to the Circuit Court of Tuscaloosa County, Alabama; there shall be taxed as costs the sum of Two Dollars in each and every action, case, suit and proceeding therein, to be collected as other costs are collected and to be paid to and disbursed by the Clerk of the Circuit Court of Tuscaloosa County, Alabama; provided that in cases appealed from Recorders Courts and in divorce cases where no alimony is awarded and in all civil and equity suits and proceedings where the amount of moneyed judgment or decree including court costs, is for less than Two Hundred Dollars only One Dollar shall be collected, and provided further that no additional sum shall be collected in any ancillary proceedings resulting from prior procedure in said Court. The sums so collected shall be expended by the Circuit Court of Tuscaloosa County by orders of the Presiding Judge thereof, for maintaining a Law Library for such Circuit Court and shall be expended only in buying law books and library furniture for the Library of the Circuit Court of Tuscaloosa County, Alabama."

Your attention is further called to the General Acts of the Legislature of 1935, p. 263, Section 9, which provides in part as follows:

"Section 9. A trial tax of three dollars ($3.00) be, and the same is hereby, imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State * * *."

You will note that the Local Act and Section 9 do not say on all cases tried in circuit court, but say, all cases filed and thereafter go upon the docket of any circuit court of the State. I am of the opinion that as soon as the case is filed and goes upon the docket in Tuscaloosa County, the library tax and the trial tax attaches and must be collected. **Biennial Report of Attorney General,** 1930-32, p. 263; **Quarterly Report of Attorney General,** Vol. V, p. 11.

The fact that the cases were consolidated after they were filed and docketed would not alter the situation.

Yours very truly,

THOMAS S. LAWSON,

Attorney General,

August 30, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties—No authority to legally appropriate money for apprehension of cattle rustlers.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 21, 1939, requesting my opinion as follows:

"Please advise us whether or not Elmore County Commissioners' Court can legally appropriate money for the apprehension of Cattle Rustlers in this county."

In my opinion, your inquiry should be answered in the negative. Public funds cannot be expended unless there is express authority or authority necessarily implied. Before a Court of County Commissioners, Board of Revenue, or other like governing body can pay any claim or do any act, it must be able to point to some statute which directly or by necessary implication authorizes it to pay the claim or to do the act. **Rice, County Treasurer v. Foshee,** 19 Ala. App. 421, 97 So. 764; **Ensley Motor Co. v. O'Rear,** 196 Ala. 481, 71 So. 704.

I am unable to find any express or implied authority of law whereby the county may appropriate money for the apprehension of cattle rustlers.

Yours very truly,

THOMAS S. LAWSON,

Attorney General,

September 1, 1939.

Hon. B. F. Burch,
Tax Collector,
Russell County,
Seale, Alabama.

Tax Collectors—Tax collector held authorized to assess newly discovered escape personal property at any time such escape property comes to his attention, subject to the limitation of five years' taxes prior to date of discovery.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of July 21, 1939, in which you request my opinion as follows:

"Please advise me if I, as Tax Collector of Russell County, have a right to pick up Escapes on Personal Property since I made my Final Settlement on July 10th last.

"According to the 1935 Revenue Code I find that a Tax Collector has the same right to pick up Escapes as the Assessor has and I am

wondering if I can still pick them up since I made my Final Settlement for the year 1938."

In reply, I wish to advise that in my opinion, you, as tax collector, are authorized to pick up escapes on personal property even though you have made final settlement for the year. I wish to refer you to Section 189 of the Revenue Law of 1935 (General Acts 1935, page 345), which provides as follows:

"Section 189. It is the duty of the collector, when engaged in the collection of taxes for any year, if he discovers that any person or property within his county has not been assessed with the tax or taxes lawfully chargeable to such person or property for that year, or any preceding year, not more than five years before that time, forthwith to assess and collect the taxes due on the same, and in writing notify the assessor of the fact so discovered, in order that proper assessment of unassessed taxes may be made, and the collector has the same authority to administer oaths and propound questions as the assessor has, and any party failing or refusing to answer such questions, or to give in his property, shall be liable to the same penalties as provided in cases where parties fail or refuse to return their property to the assessor or answer the questions required to be propounded by the assessor. In such assessments of escaped taxes, the taxpayer on giving notice to the tax collector, shall have the right of appeal as provided for escaped assessments made by the tax assessor, and all provisions and conditions applying thereto shall apply as to escaped assessments made by the tax assessor."

Your question requires a construction of the clause, "when engaged in the collection of taxes for any year." The fact that the tax collector has made final settlement for any year does not, in my judgment, preclude the assessment of escaped personal property which may come to his attention in the regular routine of his continuing duties. Taxes in litigation, bankrupt matters and taxes due on stocks of goods which are offered for sale under the advertisement of a fire sale or closing of business, etc., as you well know, are by law collectible at any time during the year, if and when the occasion demands their collection.

Under the clause quoted above, the tax collector is engaged in the collection of taxes at all times, and, in my judgment, the Legislature intended this clause to include the entire year rather than any set period of any given year. The above quoted clause, in my judgment, does not place a time limit upon the assessment of taxes upon newly discovered escaped personal property.

It is evident that the Legislature intended this clause to mean that the tax collector should be diligent in his duties, and at any time in their performance he, like the tax assessor, should place the proper assessment upon such escaped personal property as he might discover. Of course, you understand that any assessment upon any escaped property is limited to five years prior to such discovery.

I wish to further refer you to an opinion of this office reported in the Biennial Report of the Attorney General, 1936-38, at page 748, addressed to Hon. A. B. McDowell, Tax Assessor, Geneva County, under date of August 18, 1938.

Yours very truly,

THOMAS S. LAWSON.
Attorney General.

SUPREME COURT LIBRARY OF ALABAMA

September 2, 1939.

Hon. W. W. Hill,
Judge of Probate,
Montgomery County,
Montgomery, Alabama.

Marriage License—Probate Judge should not issue a marriage license to a married person.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated August 26, 1939, which follows:

"Will you kindly render an opinion on the following question:

"Has the Judge of Probate the right to issue a marriage license to a married person who has not secured a legal divorce if the person presents himself for the license and produces a doctor's certificate, and in the course of questioning they state this is their second marriage and that they are not divorced, but do not know the whereabouts of their partner in the first marriage? Must the Judge of Probate refuse to issue this license?

"Thanking you to clear this up for us."

In my opinion, the Probate Judge should not issue a marriage license to a married person as such person is not entitled to the same, because he is unable to legally enter into a marriage contract.

Section 8998 of the 1923 Code of Alabama provides as follows:

"8998. Not to be solemnized without license.—No marriage shall be solemnized without a license, to be issued by the judge of probate of the county in which the woman resides or in which the ceremony is to be performed; **which license is an authority to any one qualified to solemnize marriage to join together in matrimony the persons therein named."**

It is my opinion that it was the intention of the Legislature by passing Section 8998, supra, to restrict the issuance of marriage licenses by the Probate Judge to only such persons who are entitled to the same, that is, such persons who could lawfully contract marriage.

The fundamental rule of construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. Alabama-Southern Digest, Vol. 25, Statutes, Key No. 181(1), and Alabama cases cited thereunder.

In the case of **Sweigart v. State,** 12 N. E. (2d) 134, 114 A.L.R. P. 1117, the Supreme Court of Indiana in 1938 said:

"There can be no doubt that the Legislature may prescribe who may marry; the age at which they may marry; the procedure and form essential to constitute marriage; the duties and obligations created by marriage; the effect on the property rights of the parties and the causes

which shall be regarded as sufficient for its dissolution. This is so because the relations, duties, obligations, and consequences flowing from the marriage contract are so important to the peace and welfare of society. Wiley v. Wiley, 1919, 75 Ind. App. 456, 123 N. E. 252; 18 R.C.L. 386.

"The marriage relation is more than a personal relation between a man and woman. It is a status founded on contract and established by law. It constitutes an institution involving the highest interest of society and is regulated and controlled by law based upon principles of public policy affecting the welfare of the people of the State. Fearon v. Treanor, 1936, 272 N. Y. 268, 5 N. E. 2d 815, 109 A.L.R. 1229."

It would be against the public policy of this State to allow a married person to procure a marriage license. It would be inconsistent for a Probate Judge to issue a marriage license, when the known facts would justify an indictment and conviction for bigamy if the marriage was consummated.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 2, 1939.

Hon. John M. Maxwell,
Tax Assessor,
Morgan County,
Decatur, Alabama.

Taxation—Exemptions from taxation follow the property or persons exempted and not the rate of taxation. A subsequent change in the rate of taxation after the exemption has accrued does not affect the exemption.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of August 16, 1939, in which you request my opinion as follows:

"I wish an opinion on the following question.

"Under Section 2, Revenue Acts of 1935 and House Bill No. 64, Acts of 1936 (page 44), certain exemptions are provided, where claimed, by the county.

"If, after said exemptions have been claimed and allowed, the county increases its tax rate, does the exemption follow or only cover the rate at time allowed?"

In answer to your inquiry, it is my opinion that the exemptions are not affected by the new rate of taxation. In other words, the exemption is on the property or persons regardless of the rate of taxation.

Section 2 of the Revenue Act of 1935 provides for exemptions from ad valorem taxation on certain classes of property and persons. Some of the subsections of this section have been amended, but not material to your inquiry.

Section 3 of the Revenue Act of 1935, as amended by General Acts 1936, page 44, provides, among other things, for an exemption of certain manufacturing concerns under certain conditions from taxes for all county purposes, except for county school and school district purposes.

The exemptions above referred to are on either the property or persons as defined in said statutes. There is nothing contained therein relative to the rate of taxation. A change in the rate of taxation would not, in my judgment, repeal or modify the exemptions heretofore granted on certain property or persons. Although not absolutely in point, the cases of **Pullman Car & Mfg. Corp. v. Hamilton,** 229 Ala. 124, 155 So. 616, and **Crow v. General Cable Corp.,** 223 Ala. 613, 137 So. 665, by analogy, are authority for this conclusion.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 2, 1939.

Hon. Watkins M. Vaughan,
Judge of Probate,
Dallas County,
Selma, Alabama.

Licenses—Transient Dealers in bakery products—Permit fees—

Under Schedule 147 of the 1935 Revenue Act, transient dealer in bakery products required to pay $5.00 permit fee on each motor vehicle in excess of one used in such business outside of the county in which his principal place of business is located.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion dated August 11, 1939, which follows:

"The Selma Bakery procured a license under Schedule 147(k) of the License Law as transient dealer of bakery products and paid $20.00 for Dallas County, payable to the State, and also $5.00 for each other county in which its trucks went on such business.

"It is now claimed that in addition to the $20.00 and the $5.00 additional for each County as provided in said Schedule, this concern also owes an additional $5.00 for the State Tax Commission for a permit to do the business. This latter amount is provided under subdivision 1 of said section.

"I have read carefully this section and can see no connection between the latter $5.00 and the amount required to bakery products deal-

ers. It appears to me from a careful reading of the subdivision that it has reference to something else as the payment of the amount specifically required under Subsection (k).

"In an opinion to Hon. Frank M. Johnson, of Winston County, dated Dec. 3rd, 1935, you held that the only requirement was the payment of $20.00 State License and the $5.00 in each county in which business is done by the bakery concern.

"I would appreciate an early opinion from you as to whether these bakery concerns are required under Section 147 not only to pay the State license of $20.00 and the $5.00 to each other county where they do business, but also an additional $5.00 for each truck to the State for the privilege of doing business. If so, what licenses are the bakery concerns exempt from as provided in sub-section L, when they pay $20.00 and the additional $5.00 for each county?"

In reply to your request, I beg to advise that in my opinion transient dealers in bakery products are required, under Schedule 147 of the 1935 Revenue Act, to pay a State license of $20.00 and $5.00 to each county in which they do business, and also a $5.00 permit fee to the State of Alabama for each truck or motor vehicle in excess of one, used in such business, outside of the county in which such bakery company is located. Such $5.00 permit fee mentioned above is imposed by Subsection 1 of Schedule 147, and in my opinion it applies to transient dealers in bakery products, as well as to all other transient dealers.

What you refer to in your request as an exemption is not an exemption, but merely a classification for tax purposes. Subsection (k) puts transient dealers of bakery products in a classification, for taxation, different from the classification of transient dealers defined in Subsections (a), (b), (c), (d), (e), (f), (g) and (h) of Schedule 147.

The opinion referred to in your request, rendered to Hon. Frank M. Johnson, under date of December 3, 1935, found on page 290, Vol. I, Quarterly Report of Attorney General, deals with a different question. This opinion holds that transient dealers in bakery products are not required to pay the $20.00 State license in each county in which they do business, and holds that the payment of one $20.00 State license is all that is required by Schedule 147. This opinion does not deal in any regard with the $5.00 permit fee for each truck in excess of one, imposed by Subsection 1 of Schedule 147.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 2, 1939.

Hon. A. R. Forsyth, Director,
Department of Finance,
Capitol.

Alabama Beverage Control Act—

Alabama Alcoholic Beverage Control Board authorized to accept assignment of vendor's accounts, and to pay the same to the assignor

on the due date thereof, in the same manner and amount as it would have paid to the vendor except for such assignment.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of August 15, 1939, in which you request my opinion as follows:

"For the purpose of financing purchases by the Alabama Alcoholic Beverage Control Board, it is desired to arrange for the assignment by distillers and vendors, from whom purchases are made, of their accounts against the Board to The First National Bank of Birmingham.

"The machinery suggested is for the Accounting Department of the Board to prepare an audited and approved account in favor of the seller, the account to be further audited by the State Comptroller and approved for payment by the Governor.

"The account then to be transferred by assignment by the seller to The First National Bank of Birmingham, and payment to be made to that bank at three months from the execution of the assignment.

"The transfer to be further evidenced by an acceptance by the Administrator of the Alabama Alcoholic Beverage Control Board.

"Such accounts, as will be handled in this manner, will be subject to cash discounts, from which cash discounts the charges by the bank for carrying the account will be deducted.

"Your opinion as to the legality of such transaction is respectfully requested."

In our opinion, the Alabama Alcoholic Beverage Control Board has the legal authority to act in the manner outlined in your letter of inquiry.

Section 6 of the Alabama Beverage Control Act reads in pertinent part as follows:

"Section 6. The functions, duties and powers of the Board shall be as follows:

"(a) To buy, manufacture and sell alcoholic beverages and to have alcoholic beverages in its possession for sale, as defined and enumerated herein."

Nowhere in said act nor in any other provisions of our laws of which we are aware is there any restriction upon the manner or method by which the Alabama Alcoholic Beverage Control Board may buy alcoholic beverages, or the method or manner which it may use in paying for alcoholic beverages bought.

While it is true that contracts binding upon the State can be entered into only by the officers and in the manner provided by law, and the au-

thority and powers of State officers to bind the State by contract cannot be enlarged or varied by custom or usage (See **County Board of Education v. Slaughter,** 230 Ala. 229, 160 So. 758 and cases therein cited) yet, in our opinion, the procedure outlined in your letter of inquiry does not run counter to this principle.

Here, we have the Alabama Alcoholic Beverage Control Board indebted to a particular party in a certain amount for alcoholic beverages which that party has sold to the Board, with payment to be made by the Board at a future date. The only effect of an assignment, such as the one outlined in your letter of inquiry, is for the Board to accede to the request of the vendor to whom it is indebted that it pay to another party the amount of the Board's indebtedness to it at the time the Board has contracted to pay the same. (We do not understand your letter of inquiry to mean that the due date of these accounts is to be affected in any way by such assignment. If it was, then the assignment would probably run counter to the principle of law hereinabove stated.) As we view it, such a procedure for the payment of the accounts of the Alabama Alcoholic Beverage Control Board due by it to its vendors of alcoholic beverages is authorized by the above-quoted provision of the Alabama Beverage Control Act. This statutory authority, we think invests the Alabama Alcoholic Beverage Control Board with the power to buy alcoholic beverages and to pay for the same in such manner and on such basis as it deems to be most feasible. In following such a procedure, the Board is doing nothing more or less than exercising the powers and authority given to it by the above-cited statutory provision. In our opinion, it cannot be said that in so doing the Alabama Alcoholic Beverage Control Board is enlarging or varying by custom or usage its authority and power to bind the State by contract.

Cf. Opinion of the Attorney General to Hon. Chris J. Sherlock, Director, Highway Department, Montgomery, Alabama, under date of May 5, 1939 (Quarterly Report of Attorney General, Vol. XV, p. 92).

The opinion of this office rendered to Hon. Wm. O. Baldwin, Chairman, Alabama Alcoholic Beverage Control Board, Montgomery, Alabama, under date of June 15, 1937 (Quarterly Report of Attorney General, Vol. VII, p. 234) held that a procedure by the Alabama Alcoholic Beverage Control Board similar in detail and identical in legal effect to the one outlined in your letter of inquiry was without authority of law. Upon more mature reflection and consideration of the legal question involved, we are convinced that that opinion is laid in error, and the same is hereby specifically overruled.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 5, 1939.

Hon. J. Bruce Henderson,
Senator, 22nd District,
Capitol.

Sections 4 and 5 of Senate Bill No. 396 proposing a constitutional amendment for the establishment of a Constitutional Minimum School

Program Trust Fund held not to prohibit the Legislature from repealing or amending the statutes providing the revenues constituting the Special Educational Trust Fund nor from amending the State Minimum Program Fund Law if such amendment is adopted.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 31, 1939, requesting my opinion as follows:

"Attached is a copy of Senate Bill Number 396 to provide for a constitutional amendment.

"A question as to the construction of two constitutional points has been raised and I would appreciate your answering the following two questions:

"1. Would Section 4 of the proposed amendment prohibit the Legislature from repealing or amending the statutes providing the revenues constituting the special educational trust fund?

"2. Would Section 5 of the proposed amendment prohibit the Legislature from amending the State Minimum Program Fund Law?"

In my opinion, both of your inquiries should be answered in the negative.

Section 4 of the proposed bill provides as follows:

"Section 4. The Constitutional Minimum School Program Trust Fund shall include all funds available in the Constitutional Public School Fund and all funds available in the Minimum School Program Fund paid from the Special Educational Trust Fund revenues for the use of the elementary and high schools of the State, and there is hereby set aside from the General Fund such additional revenue as shall make such Minimum School Program Trust Fund amount to the constitutional minimum of $3.12 per month per pupil for eight months per year."

You will note from this section that the proposed amendment states the Constitutional Minimum School Program Trust Fund shall include certain funds which are available from the Special Educational Trust Fund revenues. There is nothing in the language of this section which will even remotely indicate that the statutes providing the revenues constituting the Special Educational Trust Fund could not be amended. The use of the words "all funds available" in said Section 4 clearly are indicative of the fact that from time to time the amount may vary. This variation may be caused, obviously, either by existing financial conditions of the State or by amendment to the statutes providing the revenues constituting the Special Educational Trust Fund.

Section 5 of the proposed amendment provides as follows:

"Section 5. The Constitutional Public School Fund of the State shall be apportioned and distributed as now provided by the Constitution and

all of the remainder of the Minimum School Program Trust Fund shall be allocated and administered in accordance with the State Minimum Program Fund Law for the purpose of equalizing educational opportunities and providing a minimum school term throughout the State or **as the said Minimum Program Fund Law may be amended from time to time by the Legislature as conditions may warrant,** provided, however, that no section or part of such law shall operate to prevent the equalization of educational opportunities in the State." (Emphasis supplied)

The very language of Section 5, as shown by the portion underlined in the above quotation, shows beyond dispute that there are contemplated future amendments to the Minimum Program Fund Law, subject, of course, to the restriction that such law shall not be so amended as to operate to prevent the equalization of educational opportunities in the State.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 5, 1939.

Hon. W. H. Holcombe,
Sheriff, Mobile County,
Mobile, Alabama.

Officers—Sheriff of County, as agent for an insurance company, may write fire, tornado or casualty insurance on property owned by State, County and other political divisions and subdivisions of the State.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion of August 30, 1939 as follows:

"Please give me your opinion, on the questions hereinafter particularly set out, based upon the following facts:

"I am the duly elected, qualified and acting Sheriff of Mobile County. Prior to assuming such office on January 17, 1939 and since I have been engaged in the insurance business, as an agent, up until a few weeks ago as a member of the firm of Holcombe-Roberts, a co-partnership, now, individually doing business as W. H. Holcombe & Company, representing insurance corporations in the underwriting of fire and tornado insurance, automobile, fire, theft and casualty policies and all kindred lines as well as bonds of all kinds and the like. Now:

"1. Am I anywise prohibited by law from soliciting and receiving as an agent any fire, tornado or casualty insurance to be issued and covered by insurance corporations represented by me, the property protected being owned and the premiums to be paid by either: (a) County of Mobile; (b) City of Mobile; (c) Board of School Commissioners of Mo-

bile County; (d) State of Alabama or any corporation commission or agency thereof? It is understood, of course, a commission is received by me as an insurance agent and solely out of the actual premiums charged the policy holder by the company which issues the policy, represented by me.

"2. Would I in selling and receiving such insurance business, be illegally employed in anyway under a contract for work or services with any of the policy holders mentioned, or illegally selling goods or supplies to them or in anywise pecuniarily interested therein, as principal or agent, within the purview and prohibition of Section 5024 of the Code of Alabama of 1923?

"In connection with this inquiry, I hand you herewith for your consideration copy of opinion given me under date of September 13, 1938 by my personal attorney."

In reply to your inquiry, I refer you to Section 5024 of the Code of Alabama, 1923, as amended by H. B. 300, approved March 2, 1937, which is as follows:

"5024. COUNTY OFFICERS INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS.—Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the County for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the Treasurer in lieu of a County depository from being employed as clerk to the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County."

It will be observed that the above quoted section, supra, prohibits any sheriff **from taking any contract for work or services of the County and from being employed in any way under such contract and further prohibits him from selling** any goods or supplies to the County.

The question is now presented whether or not the soliciting and receiving of fire, tornado or casualty insurance by a Sheriff who is also an agent representing various insurance corporations, as outlined in your first inquiry, falls within the purview of the above quoted section. We think not.

Section 5024 as amended, supra, is a penal statute and must be strictly construed. **Birmingham Ry. Light & Power Co. v. Milbrat, 78 So. 224, 201**

Ala. 368, **Jacobs v. State,** 85 So. 837, 47 Ala. App. 396; **Home Ins. Co. v. Cobbs,** 103 So. 165, 20 Ala. App. 491. Therefore, placing upon section 5024 as amended, supra, a strict construction we find that a sheriff is prohibited from taking any contract with a County for **work or services** or to sell to a county any **goods or supplies.** In our judgment the soliciting and receiving of fire, tornado or casualty insurance by an agent, representing various insurance companies, from a county does not constitute the taking of a contract with a county for work or services nor does it amount to selling a county any **goods and supplies.** In 32 Corpus Juris at page 1053; section 127, we find the following statements:

"Ordinarily an insurance agent represents the company whereas a broker represents the insured.* * *"

At page 1053, section 128, the following:

"An 'insurance agent' in the sense of one who is employed to solicit risks and effect insurance is the agent only of the company by whom he is appointed or employed in regard to matters connected with the soliciting of the risk, the making of the application and the issuing of the policy, and cannot be considered in any sense as the agent of insured in any matter connected with the issuing of the policy."

Citing **Commercial F. Ins. Co. v. Allen,** 80 Ala. 571, 1 S. 202

Also on page 1054 subdivision of Section 128, the following:

"An insurance agent does not become the agent of insured by reason of the fact that he is authorized to place the insurance, at his election, in one or more of several companies, which he represents."

It will be noted from a careful study of the above quoted excerpts, supra, that an agent soliciting and receiving fire, tornado or casualty insurance for insurance corporations which he represents is an agent only for the insurance company and not for the insured. Therefore, in our opinion a sheriff who represents as agent various insurance companies and solicits and receives fire, tornado or casualty insurance from a county would not be entering into a contract with the county for **work or services,** but would be working for the insurance company he represents and thus such action on the part of a sheriff would not come within the purview of this particular restriction found in Section 5024 as amended, supra. This would also apply to soliciting and receiving fire, tornado or casualty insurance from any of the other political divisions and subdivisions as set out in your first inquiry.

The other prohibition placed upon a sheriff by section 5024 as amended, supra, is that he cannot enter into a contract to sell a county any **goods and supplies.** Again placing a strict construction upon said section, supra, and particularly the words **goods and supplies** it is necessary to determine whether or not the soliciting and receiving of fire, tornado or casualty insurance by a sheriff, acting as agent for an insurance company, would constitute the entering into of a contract for the selling of **goods and supplies** to a county within the purview of said section, supra. In determining this question, we have carefully studied the definition given contracts of fire insurance, tornado insurance and other forms of insurance coming under the definition of casualty insurance and find that all such contracts of insurance amount to a **contract of indemnity only. See Sec. 26 C. J. page 17, section 1; 36 Corpus Juris, page 1056, Section 1; and 17 Corpus Juris, page 693, Section 1.** The word "indemnity" has been defined as follows:

"'Indemnity' is defined as an engagement to make good loss that may be sustained." Shaw v. Equitable Mut. Acc. Ass'n. 99 N. W. 672, 673, 5 Neb. (Unof.) 584 (quoting and adopting definition in Weller v. Eames, 15 Minn. 467 (Gil. 383), 2 Am. Rep. 150).

"'Indemnity' is that which is given to a person to prevent his suffering damage. Ordinary of State v. Connolly, 72 Atl. 363, 364, 75 N. J. Eq. 521, 138 Am. St. Rep. 577.

"'Indemnity' means reimbursement, making good, recompense for loss or injury. Rogers v. Shawnee Fire Ins. Co. of Topeka, Kan., 111 S. W. 592, 593, 132 Mo. App. 275."

We have been unable to find a definition of the word "indemnity" to mean or include "goods and supplies", and therefore the selling of fire, tornado or casualty insurance which is a "contract of indemnity" by a sheriff as agent for an insurance company would not fall within the inhibitions of Section 5024, supra.

Your second inquiry is answered by our answer to your first inquiry. The opinion of this office to Mrs. M. H. Hurt, Clerk, Macon County Board of Revenue, Tuskegee, Alabama, dated August 21, 1937, is modified to conform to the holding of this opinion.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 6, 1939.

Hon. Joseph E. Killough,
Chief Clerk, Division of Labor,
Department of Industrial Relations,
Montgomery, Alabama.

1. Industrial Relations Act of 1939 did not transfer from the Bureau of Insurance to the Department of Industrial Relations the proportionate balance for the current fiscal year of the annual amount customarily expended by the Bureau of Insurance relating to all expenditures connected with the administration of the Workmen's Compensation Act.

2. A part of the appropriation to the Insurance Department was transferred to the Department of Industrial Relations by the Industrial Relations Act of 1939.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion under date of July 20, 1939, which follows:

"We wish to call your attention to Section 10 of the Industrial Relations Act of 1939.

"In your opinion, does this section of the act provide for the transfer from the Bureau of Insurance to the Department of Industrial Relations the proportionate balance for the current fiscal year of the annual amount customarily expended by the Bureau of Insurance relating to all expenditures connected with the administration of the Workmen's Compensation Act?

"Section one of Act Number 138 of the General Laws of the Legislature of Alabama passed at the Extraordinary Session of 1933, fixed the salary of Compensation Clerk at $2,000.00 per annum. Since the Department of Industrial Relations has assumed the duties of administering the Workmen's Compensation Act the proportionate balance of this amount has been transferred to this Department. However, the cost of administering the Workmen's Compensation Act by the Bureau of Insurance entailed more than the salary of the Compensation Clerk. It included the salary of the Assistant Compensation Clerk which was not fixed by law, the cost of forms and supplies and numerous other expenses amounting to approximately $6,000.00 per year, according to the last annual report of the Superintendent of Insurance.

"Should not the proportionate balance of the amount customarily used by the Bureau of Insurance for the payment of these additional items be transferred to the Department of Industrial Relations as well as the proportionate balance of the amount used for the salary of the Compensation Clerk?"

In my opinion the Industrial Relations Act of 1939 did not transfer from the Bureau of Insurance to the Department of Industrial Relations the proportionate balance for the current fiscal year of the annual amount customarily expended by the Bureau of Insurance, relating to all expenditures connected with the administration of the Workmen's Compensation Act. All of the duties of the Department relative to the Workmen's Compensation Act were not transferred to the Department of Industrial Relations. The Superintendent of Insurance still has some duties relative to the Workmen's Compensation Act, in that he has to approve the Workmen's Compensation insurance rates, premiums and schedules as provided by Section 7584 of the 1923 Code of Alabama.

See opinion of this office to Hon. William H. Ivey, Chief, Division of Labor, under date of July 14, 1939.

In my opinion, when the office of Compensation Commissioner was transferred to the Department of Industrial Relations this transfer carried with it a part of the appropriation for the Insurance Department.

Section 9 and a part of Section 10 of the Industrial Relations Act of 1939 areas follows:

"Section 9. Abolition of the Office of Compensation Commissioner and Transfer of his Functions and Duties to the Department of Industrial Relations. The office of Compensation Commissioner is hereby abolished and all of the functions and duties of the Compensation Commissioner

(and of the Superintendent of Insurance as Ex-Officio Compensation Commissioner and of the Director of the Department of Archives and History as ex-officio Compensation Commissioner) are hereby transferred to and conferred upon the Department of Industrial Relations."

"Section 10. Transfer of Funds. (a) Transfer of Appropriations or Grants. All appropriations, grants or allotments to any department, board, bureau, commission, agency or office of the State (including those abolished hereby) whether appropriated, allotted, or granted by the State of Alabama or by the Federal Government or the Social Security Board or its successor or any other Federal Agency, for the purpose of performing any of the functions or duties hereby transferred to and conferred upon the Department of Industrial Relations or upon the Director of Industrial Relations are hereby transferred and assigned to the Department of Industrial Relations to be expended in the performance of its functions and duties, * * *"

Section 8329 of the 1923 Code of Alabama provides as follows:

"Section 8329. Superintendent of insurance is compensation commissioner.—The superintendent of insurance shall be compensation commissioner ex officio and shall possess and have all the powers and authority, and perform all the duties now conferred on the director of the department of archives and history as ex officio compensation commissioner of the State of Alabama."

The appropriation for the Compensation Commissioner was included in the general appropriation for the Insurance Department.

Section 7 of Act No. 373, H. 249, approved September 6, 1935, General Acts 1935, page 792, provides in part as follows:

"VII. BUSINESS REGULATION: 1. Insurance Department: For Compensation of Superintendent of Insurance $3,600.00; Other Salaries $7,640.00; Supplies and Materials $200.00; Postage, Telephone & Telegraph $1,050.00; Printing & Binding $4,000.00; Travel Expense $275.00; General Expense $4,125.00; Insurance & Bonding $138.00; Office Equipment $500.00 —$21,528.00. 2. Banking Department: For compensation of Superintendent of Banks $3,000.00; Other Salaries $18,000.00; Supplies & Materials $800.00; Postage, Telephone & Telegraph $900.00; Printing & Binding $350.00; Travel Expense $4,800.00; Insurance & Bonding $600.00; General Expense $5.00—$29,100.00. * * *"

I am not attempting to ascertain what part of the appropriation, supra, should be transferred to the Department of Industrial Relations, but it is my opinion that it was the intention of the Legislature by the passage of the Industrial Relations Act to transfer a part of the insurance appropriation to the Department of Industrial Relations so that the Compensation Commissioner could effectively carry on his duties relative to the Workmen's Compensation Act.

Yours very truly,

THOMAS S. LAWSON.
Attorney General.

September 7, 1939.

Hon. Matt A. Boykin,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Licenses—Peddlers—

Person peddling on the streets, by wagon or motor vehicle, to the consumer and not to a person for resale, fruits and vegetables which he purchased held not liable for license under Schedule 146 as amended by Acts 1936-37, page 277.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of August 29, 1939, in which you request my opinion as follows:

"Kindly refer to No. 230 (H-180-McDermott) Acts Ex. Sess. 1936-37. Schedule 146—under subsection "D" as follows:

" 'This Schedule shall not apply to a person or to any member of his immediate household, selling or offering to sell dairy, poultry, or farm products raised, produced or grown by himself, or the immediate members of his household, or such products preserved, bottled, or canned by himself, or the immediate members of his household, **or to persons peddling wood, charcoal, fruit or vegetables;** or to blind persons or persons physically disabled to the extent of thirty per cent (30%) such disability to be certified to by a reputable physician and the local license inspector, operating other than a rolling store, or to peddlers of poultry and eggs, or to persons selling fish, shrimp, crabs or to other sea foods.'

"Is a person liable for a license who peddles on the streets by wagon or motor vehicle, fruits and vegetables which they purchase?"

In my opinion, a party peddling on the streets, by wagon or motor vehicles, to the consumer and not to a person for resale, fruits and vegetables which he purchased would not be liable for the license imposed by Schedule 146 as amended.

The pertinent provisions of Schedule 146 set out in your request are clear to the effect that said schedule, as amended, does not apply "to persons peddling wood, charcoal, fruit or vegetables." There is no restriction imposed upon such peddlers that the article peddled be produced by the peddler himself or the immediate members of his household or that it be carried by pack or by means of other types of conveyances.

It is an oft stated principle of law that where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed and consequently no room is left for construction. We have no right to stray into

the mazes of conjecture for imaginary purposes in interpreting the language used, discretion being given for such construction only where the meaning is doubtful. **State ex rel Robertson v. McGough,** 118 Ala. 159, 24 So. 395; **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 51 So. 159.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 7, 1939.

Hon. G. C. Brittain,
County Treasurer,
Calhoun County,
Anniston, Alabama.

Sheriffs—Removal fees—

Sheriff's fee and necessary expenses for returning prisoner to county is chargeable to county.

Guard fees for returning misdemeanant to county is not a proper charge against county unless ordered by Governor or circuit judge.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your request for official opinion under date of August 22, 1939, which is as follows:

"Will you please give me a ruling on the following question?

"When the sheriff returns a prisoner charged with a misdemeanor from another county in this State, can the expenses of returning such prisoner be paid by this county?

"Hon. W. L. Borders, Sheriff of this county, has filed an expense account for removal of a prisoner, charged with reckless driving, from Fort Payne to Anniston and the items of expense are as follows:

"W. L. Borders, Sheriff, one day	$3.00
Horace Green, Guard, one day	$2.00
141 miles travel @ 5c	$7.05

"The sheriff was acting under an order from Hon. Lamar Field, Circuit Judge. The employment of the guard was authorized by Hon. Thomas W. Coleman, Judge of Probate.

"Your kindness in advising if all or any part of the expense account as filed by the sheriff can be paid by the county will be appreciated."

In the absence of information as to the cause of removal of the prisoner, my reply will be based on the assumption that the removal was authorized by law under Section 3741 of the Code of 1923.

The sheriff's per diem charge of $3.00 and his necessary traveling expenses has already been held by this office to be a proper charge against the county. Biennial Report of Attorney General, 1936-38, page 256; opinion of Attorney General to Judge of Probate of Houston County, under date of September 18, 1935 (copy enclosed).

I am of the opinion that the use of the guard was unauthorized and his fee cannot be charged to the county.

Section 3746, Code of 1923, specifically provides in part as follows:

> "* * * But no guard shall be obtained for the removal of a prisoner charged with a misdemeanor, except upon the order of the governor, or a circuit judge, in cases when it is necessary to protect the prisoner from violence."

Under your statement of facts, the guard was authorized by the probate judge. Under the provision quoted above only the Governor or the circuit judge can order the use of a guard and then only in cases in which he believes a guard is necessary to protect the prisoner from violence. Since the law of costs and fees must be strictly construed and no fee can be charged unless expressly provided by law (Section 3734, Code of 1923), the guard fee of $2.00 cannot properly be paid by the county. Cf. Biennial Report of Attorney General, 1930-32, page 820.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 7, 1939.

Hon. Chris J. Sherlock,
State Highway Director,
Capitol.

State may claim as a setoff the amount due the State for ad valorem taxes.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated August 28, 1939, which is as follows:

"Re: Selma Truck Company, Inc. Ad valorem taxes.

"This Department has been advised by the Probate Judge of Dallas County that there is unpaid the amount of $272.30 ad valorem taxes against the Selma Truck Company, Inc. The Judge has asked that we withhold payment of this money because of the fact that the ad valorem taxes were due. It further appears that there is no property on which a levy can be made and there is an unpaid final estimate in the hands of the auditor of this Department in favor of the Selma Truck Co., which has been taken over by the bonding company for the Selma Truck Co. This final estimate has not been paid and this Department wishes to retain same until you advise whether or not the ad valorem taxes due should be deducted from this money.

"Your prompt reply will facilitate the disposition of this matter.

"Herewith enclosed copies of letters relative to this matter."

In my opinion you should not pay the final estimate until the ad valorem taxes have been paid to the State.

If the Company could sue the State or file a claim for the balance due it by the final estimate, the State could claim as a setoff the amount the company owes the State for ad valorem taxes.

"In Actions against States. A state being sued may setoff a claim it holds against plaintiff." **59 C. J. 320.**

In the case of Ada Inv. Co. v. State, 234 Pac 304, the Supreme Court of Idaho in 1925 held:

"The state, or the department of commerce and industry, which is an arm of the state, and therefore, so far as the state insurance fund is concerned, is the state, has power and authority to collect and sue for moneys due this fund; therefore in a suit brought against the state for a recommendatory judgment the question of whether it is a general or special fund would not affect the authority of the state to urge a set-off of moneys admittedly due a department of the state. C. S. Secs. 6695, 6696, 6697; 24 R. C. L. 78; 34 Cyc. 633; Commonwealth v. Phoenix Bank, 11 Metc. (Mass.) 129.

"The state in this suit has a right to urge as a set-off against the plaintiff a confessedly existent claim for moneys due the state insurance fund."

In the case of **Commonwealth vs. President, Directors, etc. of the Phoenix Bank,** 11 Metcalf Reports, p. 129 (Mass.), the Supreme Court of Massachusetts in 1846 held that a bank tax imposed and due from the bank, may be set off against money due from the Commonwealth to the bank on a loan.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 9, 1939.

Hon. Thomas W. Coleman,
Judge of Probate,
Calhoun County,
Anniston, Alabama.

Filing Tax—Deeds executed by tenants in common for the same consideration, only one of such instruments is subject to a deed filing tax when offered for recordation by virtue of Schedule 46 of Section 348 of Act No. 194, General Acts of Alabama, 1935, page 456.

Opinion by Assistant Attorney General Crosland.

Dear Sir:

I have your request for official opinion as follows:

"Re: Deed tax under Section 348, Schedule 46 of the General Revenue Act of 1935.

"There have been presented to me as Judge of Probate of Calhoun County for recording the following deeds:

"1. A quit-claim deed by T. Ben Kerr, as Administrator of the estate of Callie A. Woolf, deceased, to Planters Chemical & Oil Company, covering certain real property, upon which the deed recites that the Administrator holds a mortgage from F. X. Woolf and wife. The deed recites a paid consideration of $250.00 to be applied on this mortgage.

"2. A quit-claim deed by the First National Bank of Piedmont, Alabama, to the Planters Chemical & Oil Company covering the same real property as the above described deed by T. Ben Kerr and certain personal property, which deed recites that the Bank is the mortgagee of said property under a mortgage executed by J. L. Woolf and wife, holds a judgment lien on said property under a judgment against F. X. Woolf and also holds a judgment lien on said property under a judgment against the Woolf-Adderhold Gin Company, a partnership, and J. L. Woolf as partners and individually. The deed recites a paid consideration of $875.00.

"3. A statutory warranty deed by Roy M. Woolf and wife to Planters Chemical & Oil Company covering the same real and personal property as the above described deed of the First National Bank of Piedmont. The deed recites a consideration of $1,125 paid to T. Ben Kerr, as Administrator, and the First National Bank of Piedmont, to be applied on the indebtedness secured by the above mentioned liens.

"4. A statutory warranty deed by Christine Woolf Adderhold and her husband to the Planters Chemical & Oil Company covering the same real and personal property. The deed recites the same consideration as the above mentioned deed by Roy M. Woolf and wife.

"5. A warranty deed by J. L. Woolf and wife to the Planters Chemical & Oil Company covering the same real and personal property. The deed recites the same consideration as the above mentioned deed of Roy M. Woolf and wife.

"6. A warranty deed by F. X. Woolf and wife to the Planters Chemical & Oil Company covering the same property, real and personal. The deed recites the same consideration as the above mentioned deed by Roy M. Woolf and wife.

"7. A quit-claim deed by Nellie Woolf to the Planters Chemical & Oil Company covering the same real and personal property. The deed recites the same consideration as the above mentioned deed by Roy M. Woolf and wife.

"8. A warranty deed by R. P. Woolf to the Planters Chemical & Oil Company covering the same real and personal property. The deed recites a paid consideration of $250.00.

"9. A warranty deed by J. H. Woolf and wife to the Planters Chemical & Oil Company covering the same real and personal property. The deed recites a paid consideratoin of $400.00.

"It is recited in the above mentioned deeds that Roy M. Woolf, Christine Woolf Adderhold, J. L. Woolf, F. X. Woolf, R. P. Woolf, and J. H. Woolf are brothers and sister, and they owned the real and personal property described in the above mentioned deeds as tenants in common. The deeds also recite that J. L. Woolf and F. X. Woolf are stepsons of Nellie Woolf. Nellie Woolf executed only a quit-claim deed, and in fact had no known interest in the property conveyed.

"The deeds by T. Ben Kerr, as Administrator, the First National Bank of Piedmont, Alabama, R. P. Woolf and J. H. Woolf are, of course, taxable under Section 348, Schedule 46 of the General Revenue Act of 1935 on the basis of their recited consideration, but since the other deeds each recited a consideration of $1,125 paid to T. Ben Kerr, and the First National Bank of Piedmont, Alabama to be applied on certain indebtedness of J. L. and F. X. Woolf, and the deeds by T. Ben Kerr as Administrator and the First National Bank of Piedmont, Alabama show that $1,125 has been received by them, ($250.00 by T. Ben Kerr, and $875.00 by the First National Bank of Piedmont), the question arises as to whether or not these other deeds are taxable under Section 348, Schedule 46 of the General Revenue Act of 1935.

"I call your attention to the following proviso to the first sentence of that schedule, which imposes the tax:

> "'And provided, further, that when several deeds or instruments are executed by tenants in common for the same consideration, only one of such instruments shall be taxable under this Schedule.'

"And I request your opinion as to the amount of tax, if any, to be collected by me for the recording of the deeds of Roy M. Woolf and wife, Christine Woolf Adderhold and husband, F. X. Woolf and wife, J. L. Woolf and wife, and Mrs. Nellie Woolf."

In response to my inquiry relative to your request you apprised me in your letter of August 16, 1939, that the total consideration received for the deeds from Woolf and others and T. Ben Kerr, as Administrator, to the Planters and Oil Company was $1125.00.

It is my conclusion that the deeds from Roy M. Woolf and wife, Christine Woolf Adderhold and husband, J. L. Woolf and wife, F. X. Woolf and wife and Mrs. Nellie Woolf to the Planters Chemical & Oil Company are not subject to a deed filing tax when offered for record.

Schedule 46 of Section 348 of Act No. 194, General Acts of 1935, page 456, referred to in your request, specifically provides that when several deeds or instruments are executed by tenants in common for the same consideration, only one of such instruments shall be taxable. The deeds were executed by tenants in common, recited the same consideration, and are squarely within the purview of the proviso of said Schedule 46. Therefore, it is my opinion that when a proper deed filing tax is paid on the deeds from T. Ben Kerr, as administrator of the estate of Callie Woolf, the first National Bank of Piedmont, R. P. Woolf and J. H. Woolf, the deeds in question are relieved of a filing tax.

In determining the amount of filing tax to be assessed against deeds from T. Ben Kerr, as administrator of the estate of Callie Woolf, the First National Bank of Piedmont, R. P. Woolf and J. H. Woolf, I wish to refer you to an opinion of this office rendered to Hon. John T. Frazier, Judge of Probate, Lee County, Opelika, Alabama, Quarterly Report of Attorney General, Volume XIV, page 139. Said opinion holds that the yardstick for measuring the amount of filing tax to be charged for the recordation of deeds is the actual fair market value of the property conveyed, which is not necessarily the consideration recited in the deed, although prima facie evidence of the true value, nor the value of said property as fixed by the records of the Tax Assessor, and that the determination of the amount of tax to be paid on an instrument is left to the Judge of Probate.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 9, 1939.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Public Service Commission—

Members of Public Service Commission have been, and are now, entitled to receive the $1,000.00 additional compensation provided in Section 54 of the 1931 Motor Carrier Act (General Acts 1931, p. 322), there being no restriction thereon by the Lapsley-Lusk Act (General Acts 1933, p. 124).

Opinion by Asssitant Attorney General Loeb.

Dear Sir:

I have your letter of September 1, 1939, in which you request my opinion as follows:

"The General Acts of Alabama, Regular Session 1931, Act No. 273, Section 54, reads as follows, with reference to the Alabama Public Service Commission:

"'For the extra, new and additional duties imposed upon the Commission and the members thereof by this Act, and for the performance of the duties which are and will be hereafter required of said Commission and the members thereof hereunder, each member of the Commission shall receive One Thousand Dollars annually, to be paid monthly as the salaries of other officers are paid, only out of monies in the State treasury to the credit of the said Motor Carrier Fund, as provided in this Act, which is to take the place of said sum now received by each member of said Commission under the Alabama Motor Carrier Act of 1927, which Act is hereby repealed.'

"The General and Local Acts of Alabama, Extra Session 1933, Act No. 138, page 128, sets the yearly salaries of the officers of the Alabama Public Service Commission as follows:

President	$3600.00
Two Associate Commissioners (each)	3000.00

"Section 4 of this same Act, page 129, reads as follows:

"'Wherever the duties of more than one office, position, or employment shall be filled, performed or discharged by one officer or employee, such officer or employee shall only receive the salary named for the highest paid office, position or employment so filled, performed or discharged.'

"I would like to have your official opinion as to whether the President and the two associate commissioners of the Alabama Public Service Commission should be paid $1,000 (each) yearly in addition to the salaries set out in the Lapsley-Lusk Act, Senate Bill No. 183"

It is my opinion that the members of the Public Service Commission have been, and are now, entitled to receive the additional compensation provided in Section 54 of the 1931 Motor Carrier Act (General Acts 1931, pages 303-322).

Prior to the enactment of the Lapsley-Lusk Bill (Acts 1933, p. 127), the salaries of the members of the Commission were prescribed by an act approved September 29, 1923 (Acts 1923, p. 789), in pertinent part as follows:

"The salary of the President of the Public Service Commission shall be five thousand dollars ($5000.00) for every year; the salary of the two associate members of the Public Service Commission shall be forty-five hundred dollars ($4500.00) each for every year."

The Lapsley-Lusk Bill (Acts 1933, p. 124) provided in pertinent part as follows:

"THE SALARIES OF THE OFFICERS AND EMPLOYEES OF THE ALABAMA PUBLIC SERVICE COMMISSION SHALL BE AS FOLLOWS: President $3,600. 2 Associate Commissioners (each) $3,000. * * *

"Section 4. Wherever the duties of more than one office, position or employment shall be filled, performed or discharged by one officer or employee, such officer or employee shall receive only the salary named for the highest paid office, position, or employment so filled, performed or discharged."

It is obvious that the Lapsley-Lusk Bill repealed the quoted part of the 1923 Salary Act. Did it repeal also Section 54 of the act approved June 19, 1931, (Acts 1931, pages 303-322) quoted in your inquiry? If so, such repeal is by implication only and our Supreme Court has repeatedly declared that repeal by implication is not favored. In **City of Birmingham v. Southern Express Co.,** 164 Ala. 529, 538, our Supreme Court made a clear statement of the law respecting repeal by implication, such statement being as follows:

"Repeal by implication is not favored. It is only when two laws are so repugnant to or in conflict with each other that it must be presumed that the legislature intended that the latter should repeal the former. This is never the case if there be a reasonable field of operation, by a just construction, for both; for then they will both be given effect. This is preferable to repeal by implication."

(See also numerous cases collected in Alabama Digest under Statutes, Key Number 158.)

The compensation and salaries of the members of the Public Service Commission prior to the enactment of the Lapsley-Lusk Bill were fixed by the act approved September 29, 1923, heretofore quoted. Under Section 281 of the Constitution those salaries could not be increased or diminished during the term for which the members had been elected. Under Section 280 of the Constitution, the members of the Public Service Commission could not, at the same time, hold another office of profit under this State. Section 54 of the act approved June 19, 1931 (Acts 1931, pages 303, 322), as well as Section 47 of the act approved August 23, 1927 (Acts 1927, pages 309, 323), were valid and constitutional, not upon the theory that another office was created (for that would have violated Section 280 of the Constitution), nor upon the theory that the salary of the commissioners was increased (for that would have violated Section 281 of the Constitution), but because new and additional duties were imposed on the commissioners, which justified extra compensation. (See **Tayloe v. Davis,** 212 Ala. 282, 102 So. 433; Note 21 A. L. R. 256; Note 51 A. L. R. 1522). In Section 54 the Legislature was careful to follow the language of the court in the case of **Tayloe v. Davis,** supra.

There was a marked distinction between the fixed salary of the office and the compensation for services in the performance of substantial new and additional duties attached to the office. The fixed salary of the office, prescribed by the act approved September 29, 1923, was to be paid out of the General Fund of the State Treasury. The compensation for the extra, new and additional duties was expressly required by said Section 54 to be paid out of monies in the State Treasury to the credit of the Motor Carrier Fund. The fixed salaries of the members could not be diminished without violating Section 281 of the Constitution, and that result could not be accomplished even by decreasing the services to be rendered by the officers.

"A public officer cannot be deprived of his salary even if the services to be rendered are decreased." 46 C. J. p. 1025, Section 263.

On the other hand, the compensation for the extra, new and additional duties might be transferred to another officer by transfer of those duties. (See **State ex rel Ward v. Henry**, 224 Ala. 224, 139 So. 278.) Or the right to receive such compensation might terminate upon repeal of the act imposing those duties. (See **State v. Henry,** supra, also 46 C. J. 1025, Section 263.) Our Alabama Supreme Court has defined salary as follows:

> "A salary is a fixed compensation 'decreed by authority, and for permanence' is paid at stated intervals, and depends upon the time, and not the amount of services rendered.—Dane v. Smith, 54 Ala. 47; Benedict v. United States, 176 U. S. 357, 20 Sup. Ct. 458, 44 L. Ed. 503." Brandon, Auditor v. Askew, Solicitor, 172 Ala. 160.

It seems clear to me that there was a substantial distinction between the salaries of the members of the Public Service Commission and their compensation for new or additional duties allowed by said Section 54. The distinction is well recognized in the case of **McElderry v. Abercrombie,** 213 Ala. 289, 104 So. 671:

> "It is not here questioned that a public officer may, when duly authorized by law, receive, **beside the fixed salary of his office,** compensation for services in performance of substantial new and additional duties attached to his office, without a violation of the constitutional provisions against dual office holding and increase of salary during his term." (Emphasis supplied).

In the case of **Benedict v. U. S.,** 176 U. S. 357, cited in the Brandon case, the Supreme Court of the United States held that "extra compensation received by a district judge for holding court outside of his own district is no part of his official salary, or recoverable as such under the provisions of the retiring act." This case is clearly in point. The appellant, Benedict, was a United States District Judge for the Eastern District of New York. His salary as District Judge was at the rate of Five Thousand ($5000.00) Dollars per annum. Under another act of Congress a provision was made that the United States District Judge of said Eastern District of New York might hold a term of court for the Southern District of New York, exclusively for the trial and disposal of criminal business and that for each such term held by said judge of the Eastern District, he should receive the sum of Three Hundred ($300.00) Dollars.

Upon his retirement as such Judge of the Eastern District, he filed a claim for retirement pay in the amount of Six Thousand Eight Hundred ($6,800.00) Dollars per annum, which he stated was made up of his salary of Five Thousand ($5000.00) Dollars and the additional amount of Eighteen Hundred ($1,800.00) Dollars which he received during the year previous to his resignation for holding six terms of court as above described in the Southern District.

The Supreme Court of the United States in passing on the question upon appeal from the Court of Claims held that, since the Act of Congress provided that when any such judge retired after having served the necessary period of years, and having attained the age of seventy years, he should receive the same salary which was by law payable to him at the time of his resignation, the amount covered by the term "salary" being Five Thousand ($5,000.00) Dollars per annum.

This case holds clearly that the additional amount paid to this judge for his services in another district under another statute providing compensation for such additional services, did not come within the term "salary". The court said:

> "The word 'salary' may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered."

The conclusion must be reached, therefore, that prior to the enactment of the Lapsley-Lusk Bill the members of the Public Service Commission were entitled (1) to fixed salaries of the office and (2) to the compensation for the extra, new and additional duties allowed by said Section 54. The Lapsley-Lusk Bill confines its operation to the "salaries" of the officers. Section 4 of that bill is without application because only one office is involved, though there are extra, new or additional duties of that one office. The case here presented does not involve "the duties of more than one office" because it is clear that there is only one office. The case here does not involve "the duties of more than one position" or "the duties of more than one employment". Employment cannot have any application here because there is no such relation between the State and the members of the Public Service Commission. The relation of the members of the Public Service Commission to the State is that of "officers", elected for a fixed term and such relation would not be appropriately described as a "position". The Alabama Motor Carrier Act of 1931 did not create an additional position so far as the members of the Public Service Commission were concerned. Before that act they were simply members of the Commission holding the offices of President and Associate Commissioners, and they were the same after that act. No change had been made in their relation to the State in any way except that the new and additional duties of regulating motor carriers had been imposed upon them. It is, therefore, my opinion that the Lapsley-Lusk Bill did not impliedly repeal or in any way affect the said Section 54.

This conclusion is strengthened by a consideration of Schedule 158.23 of Section 348 of the 1935 General Revenue Act (Acts 1935, p. 530), which seems to be a legislative recognition that the members of the Public Service Commission are still entitled to the compensation allowed by said Section 54.

The preceding Schedules, 158.21 and 158.22, had transferred to the State Tax Commission the duty to collect the mileage tax and certain other duties theretofore performed by the Alabama Public Service Commission. Nevertheless, Schedule 158.23 provided that the Motor Carrier Fund should be used in part as follows:

> "For the payment of all necessary expenses, as approved by the Governor, of the Public Service Commission incurred in the discharge of its duties under said Act approved October 28, 1932, and in the discharge of its duties under the 'Alabama Motor Carrier Act of 1931', including payment to the Public Service Commission of the appropriation of fifteen thousand dollars, subject to the approval of the Governor, now made to it under said 'Alabama Motor Carrier Act of 1931.'"

The same amount, fifteen thousand dollars, was the amount allowed by Section 5 of the act approved June 19, 1931, to be expended by the Public Service Commission for the enforcement and administration of the act. (See Acts 1931, p. 310). The compensation of the three commissioners in the

amount of one thousand dollars each annually, allowed by Section 54 was required to be paid out of monies in the State Treasury to the credit of the Motor Carrier Fund. The three thousand dollars necessary for the payment of this compensation came out of the fifteen thousand dollars allowed the Public Service Commission for the enforcement and administration of the act, and after payment of the expenses not to exceed fifteen thousand dollars the surplus at the end of each fiscal year was required to be credited one-half to the Highway Department and one-half to be equally divided among the several counties. (Acts 1931, p. 310).

There was, therefore, available to the Public Service Commission out of the Motor Carrier Fund three thousand dollars for the compensation of the three members of the Commission, and not exceeding twelve thousand dollars per annum for other expenses for the enforcement and administration of the act. Under the 1935 General Revenue Act the same fifteen thousand dollars is still available to the Public Service Commission out of the Motor Carrier Fund.

The conclusion is inescapable that if the Legislature in 1935 contemplated that the extra compensation to the Commissioners was no longer in effect and had been repealed by the operation of the Lapsley-Lusk Bill the appropriation of $15,000.00 would have been reduced by $3,000.00. Undoubtedly the Legislature in 1935 intended, as were clearly the provisions of the 1931 Motor Carrier Act, that a part of the expenses of the act was evidenced by extra compensation to the members of the Public Service Commission. If there had been any doubt about the situation up to that time, then the provisions of the schedule above referred to have completely removed them.

Still further strengthening our conclusion is the judgment of the Circuit Court of Montgomery County rendered in the case of **Hugh White, S. F. Lee and W. C. Harrison, as members of the Public Service Commission v. Chas. W. Lee, State Comptroller,** in February, 1938, wherein it was held in a test suit involving the identical question presented by your inquiry that the members of the Public Service Commission were entitled to receive the $1,000.00 annually provided by Section 54 of the 1931 Act. No appeal was ever taken from this decision.

It is our opinion that the additional compensation provided by Section 54 of the act approved June 19, 1931 (Acts 1931, pages 303-322) is in a separate class from the fixed salaries of the members of the Public Service Commission; that said Section 54 was not repealed by the Lapsley-Lusk Bill, and that the members of the Public Service Commission of Alabama are still entitled to receive the one thousand dollars annually provided by said Section 54.

Yours very truly,

THOMAS S. LAWSON.
Attorney General.

September 9, 1939.

Hon. W. P. Jordan,
Sheriff, Fayette County,
Fayette, Alabama.

Where a defendant is arrested in possession of prohibited liquors and the affidavit and warrant charged the offense of violating the prohibition law, but on trial the defendant is permitted to plead guilty of public drunkenness, there can be no seizure fee charged.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 23, 1939, in which you request my opinion as follows:

"Question:—Where the sheriff arrests a defendant with prohibited liquors, and warrant sworn out for violating prohibition law only, and no other charge, and Judge J. M. Moore lets the defendant plead guilty to public drunkenness and pay small fine, does the settlement like this bar the sheriff from seizure fees of $3.00 and mileage, 10c per mile, $2.00 at night? Please let me know what sheriff's fees should be at once."

I cannot see how, under the facts stated by you, the judge was able to let the defendant plead guilty to public drunkenness under an affidavit and warrant charging violation of prohibition laws. Certainly public drunkenness is not included in such a charge. Section 3883 of the Code of Alabama, 1923, sets out what constitutes public drunkenness, and is as follows:

"3883. Appearing in public or at private residence while drunk or intoxicated.—Any person who, while intoxicated or drunk, appears in any public place where one or more persons are present, or at or within the curtilage of any private residence, not his own, where one or more persons are present, and manifests a drunken condition by boisterous or indecent conduct, or loud and profuse discourse, must, on conviction, be fined not less than five nor more than one hundred dollars to be paid in money only."

However, if the defendant is permitted to make such a plea under a mere affidavit charging public drunkenness, and the plea stands, there could be no seizure fee charged in the bill of costs against the defendant as no such fee can accrue in a case of public drunkenness. I refer you to an opinion of this office rendered to Hon. W. G. Culp under date of May 23, 1939, Quarterly Report of Attorney General, Vol. XV, page 218. This opinion sets out how seizure fees are taxed and collected.

Yours very truly,

THOMAS S. LAWSON.
Attorney General.

September 9, 1939.

Hon. S. P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Licenses—Municipal Corporations—Constitutional Law. Provisions of municipal ordinance imposing lesser license fee against bakeries having place of business regularly opened to public than that imposed on itinerant dealers in bakery produces do not constitute discrimination against itinerant dealers in bakery products.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of August 30, 1939, which follows:

"An incorporated Municipality in South Alabama has the following License Schedule as to Bakeries:

"'Schedule 15—Bakeries (a) Each person having an established place of business and bakery plant within the city of....., who is engaged in the business of operating a bakery and selling bread, either at wholesale or retail ..... $50.00.

"'(b) Each itinerant trader or dealer in bread, commonly known as loaf or light bread, or bakery products, either wholesale or retail....$200.00.'

"Kindly advise me if the said Municipality can maintain such a Schedule discriminating against the out of town bakeries; and whether such a City Ordinance is constitutional as discriminating against such out of town, or itinerant, dealers."

In reply to your request, I advise you that in my opinion the above referred to ordinance in so far as it applies to itinerant dealers of bakery products is neither offensive to the Federal Constitution or the Constitution of Alabama.

I call your attention to the case of **American Bakeries Company v. City of Huntsville,** 232 Ala. 612, 168 So. 880, in which a municipal license identical to the one referred to in your request was attacked on the grounds that such license was unconstitutional, illegal, void, arbitrary, discriminatory and confiscatory. The license in the **American Bakeries Co. case,** supra, was also attacked on the ground that it violated the first section of the 14th Amendment to the Constitution of the United States, and also Article 4, Section 2 of the Constitution of the United States and Sections 1, 35 and 89 of the Constitution of Alabama.

The Supreme Court, speaking through Justice Knight, in the **American Bakeries Company** case, supra, had this to say:

"In our view of the ordinance, it neither offends the above referred to provisions of the Federal Constitution nor any of the provisions of sections 1, 35, and 89 of the Constitution of Alabama."

I further call your attention to the case of **American Bakeries Co. v. City of Opelika,** 229 Ala. 388, 157 So. 206, in which case the Supreme Court held:

"It is well settled that a schedule of licenses may be prescribed for an itinerant person, firm, or corporation different from that prescribed for one having an established place of business within the municipality. 37 C. J. 227, 228; State v. Cater, 184 Iowa 667, 169 N. W. 43, 46; Levy v. State, 161 Ind. 251, 68 N. E. 172; Mathison v. Brister, 166 Miss. 67, 145 So. 358; State v. Harrington, 68 Vt. 622, 35 A. 515, 34 L. R. A. 100; Dozier v. State, 154 Ala. 83, 46 So. 9, 129 Am. St. Rep. 51."

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 11, 1939.

Hon. J. L. Bowden,
Sheriff, Monroe County,
Monroeville, Alabama.

Sheriffs—Seizure Fees—

When a search warrant is issued by an officer having jurisdiction of the same, and search is directed to be made of certain premises or places for prohibited liquors, the fees provided for by the Act approved September 2, 1935, General Acts 1935, page 727, are all the fees that the sheriff or other officer can charge for making such search.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of August 17, 1939, in which you request my opinion as follows:

"State Examiners charged back to me for search warrants in violation of prohibition law cases where a seizure was made, on the grounds that I am not entitled to both search warrant and seizure fees.

"I wish to refer you to No. 3741, Code of Alabama, 1923, also to No. 299, Act of the Regular Session, 1935. If I obtain a search warrant and make a search and can find no liquor I get no fee because I have no case, but if I do find liquor under the above regulations I still get nothing.

"Please advise me if I am entitled to this fee for the execution of a search warrant or not."

It is my opinion that the following provisions of Section 3741, Code of Alabama, 1923

"For executing search warrant by day..... $1.00
For executing search warrant by night..... 2.00"

have been superseded by the Act approved September 2, 1935, General Acts 1935, page 721, that is, insofar as these items relate to search and seizure under search warrant for prohibited liquors. The above act sets up a separate and independent schedule of fees in such cases and provides all the fees to be charged in such cases. Section 1 of said act is as follows:

"Section 1. That Section 4768 of the Code of Alabama be amended so as to read as follows: '4768. ALLOWANCE FOR OFFICERS ATTENDING AND PROSECUTING CONDEMNATION PROCEEDINGS; HOW TAXED AND PAID.—There shall be allowed the officer making the seizure under a search warrant the sum of three dollars, and also the sum of two dollars additional for every day that such officer shall necessarily be employed in attending court for the purpose of causing liquors seized to be condemned, and the sum of ten cents per mile for each mile he shall travel in executing the writ, together with such reasonable sum as the court may deem just for necessary expenses incurred in transporting and providing storage for liquors and vessels seized; provided, however, that where a warrant is issued to any peace officer acting under the laws of the State of Alabama to search a designated place for prohibited liquors and beverages, and such officer executes such warrant and seizes such liquors or beverages, but fails to arrest any person or persons for having such prohibited liquors or beverages in his or their possession, then no fees, mileage or allowances shall be paid to any one for any service under this article; provided, further, that where a warrant is issued to any peace officer acting under the laws of the State of Alabama to search a designated place for prohibited liquors or beverages, and such officer executes said warrant, seizes such prohibited liquors or beverages, arrests one or more persons alleged to have had the possession of such liquors or beverages at the time of said seizure, and said person is tried and acquitted of the charge or charges arising out of the possession, use, or sale of said seized prohibited liquors or beverages by the Court having jurisdiction of the cause, or the cause is nol prossed by such court or withdrawn and filed, then the fees, mileage or allowances above named shall be taxed and paid as in criminal prosecutions in which the State fails, upon the Court, or Judge, or Justice making an order to that effect, if, however, the arrest of one or more persons alleged to have had the possession of such liquors or beverages be made and the defendant or defendants finally convicted, the costs or fees hereinabove set out shall be taxed in the bill of costs against such defendant, or defendants, and if not collected from such defendant or defendants, so convicted shall be taxed and paid as in criminal prosecutions in which the State fails, upon the Court, or judge or justice making an order to that effect."

See opinion of this office of July 15, 1939, to Hon. D. L. Roberson, Judge, Municipal Court, Limestone County, Athens, Alabama, a copy of which opinion is herewith enclosed for your information.

Therefore, it is my opinion that when you are armed with a search warrant to search for prohibited liquors you are entitled only to the fees provided by the Act of 1935, supra, and are not entitled to the fees provided by Section 3741, supra, which provision covers search warrants provided for under the General Laws of the State, and would include search warrants for prohibited liquors, of course, but for the Act of 1935, supra, which act makes specific provision for search warrants for prohibited liquors.

See **State ex rel Holcombe v. Stone,** 26 Ala. App. 187, 155 So. 636; Cert. Den. 229 Ala. 88, 155 So. 637.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 11, 1939.

Hon. J. Lee Smith,
Judge of Probate,
Chilton County,
Clanton, Alabama.

Sparks Amendment suspends protection given officer under Section 281 of the Constitution.

Compensation of Jury Commission appointed under General Acts 1931, affected by General Act, 1933.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 8, 1939, in which you request my opinion as follows:

"Under the provisions of Acts 1931, page 56, being the Jury Board law, passed at the beginning of the Miller Administration, three jury commissioners were appointed for Chilton County, their appointment being prior to April 19, 1933. You will notice that said Act provides for $5.00 per day for the time actually engaged in the discharge of their duties as such member of the Jury Board and not to exceed $100.00 in counties of a population of 25,000 or less. Chilton County according to the last preceding Federal census of 1930, has a population of 24,579. These three commissioners continued to serve unto 1935, 1936 and 1937, then their successors were appointed by the Honorable Bibb Graves, Governor.

"Acts 1933, page 136 amended said Jury Board Law by reducing the compensation to not exceeding $50.00 in counties of 25,000 population or less.

"In view of Section 281 of the Constitution, which is the Constitutional provision against the reduction of an officer's salary while in office, would Acts 1933, page 136, as to compensation, effect or control the Jury Board's compensation appointed under Acts 1931, supra? I would cite you the Opinion Attorney General 1936-38, page 137, holding that members of a Jury Board is an office of profit within the meaning of the Constitution. Also the case of Franklin County v. Richardson, 202 Ala. 46, 79 So. 384, which holds that the compensation of members of the County Board of Equalization, being fixed by the Court of Revenue is not subject to dimunition or increase during the term of office under the Constitution of 1901, Section 281."

Answering your inquiry the jury boards of the State were appointed by authority of the General Acts of the Legislature 1931, page 55, which provides in part as follows:

"Section 2. That each of said Jury Boards shall be composed of three members who shall be qualified electors of the county in which they are appointed and shall be men reputed for their fairness, impartiality, integrity and good judgment. Members of the Board shall not during the term for which they are appointed and during their tenure in said office hold any other office by appointment or election or perform any other public duty under the federal, state, county or municipal government, which carries with it any compensation whatsoever.

"Section 3. That within ninety days after the passage and approval of this Act the Governor shall appoint the members of each Jury Board whose terms of office shall be as follows and until their successors are appointed and qualified: One member shall hold office until the first Monday after the second Tuesday in January, 1932; one member shall hold office until the same day in 1933; one member shall hold office until the same day in 1934. The Governor in making such appointments shall designate the terms to be held by each appointee respectively; and upon the expiration of each of these terms, the Governor shall appoint successors who shall hold office for three years from the expiration of the term of office of their respective predecessors."

"Section 5. Each member of the Jury Board shall be paid the sum of Five Dollars ($5.00) per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the county treasury upon the warrant of the probate judge of the county. Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the Board shall not exceed for any year of his term the following amounts, viz: In counties of twenty-five thousand population or less One Hundred Dollars ($100.00) * * *."

In addition thereto the members of the jury boards were required to take the oath of office under Section 279 of the Constitution.

Section 281 of the Constitution provides as follows:

"The salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The Attorney General in an opinion rendered on March 16, 1937, to Hon. A. J. Lewis, Member of Jury Board of Morgan County held that a jury commissioner was an office of profit under Section 280 of the Constitution of 1901.—Biennial Report of Attorney General, 1936-38, page 137.

The extra session of the Legislature of Alabama of 1933, page 136, amended Section 5 of the Acts of 1931 pertaining to jury commissioners and provides in part as follows:

> "Each member of the jury board shall be paid the sum of Five Dollars ($5.00) per day for the time actually engaged in the discharge of his duties * * * but the compensation of each member of the board shall not exceed for any year of his term the following amounts * * * in counties exceeding twenty-five thousand population or less Fifty Dollars ($50.00)."

Section 3 of this Act provides that this Act shall take effect upon its approval by the Governor.

The Sparks Amendment to the Constitution passed by the extra session of the Legislature of 1933 was submitted to the people and ratified on August 2, 1933, and provides in part as follows:

> "* * * Any act of the legislature heretofore adopted decreasing or diminishing the salary, fees or compensation of any such officer or officers, and which by its terms is to become effective after the expiration of the present term of any such officer or officers, shall, by virtue hereof, become effective from and after the first day of the month next succeeding the date of the ratification and adoption of this amendment: Provided, however, that should the legislature adopt any other act or acts decreasing or diminishing the salary, fees or compensation of any such officer or officers during the term for which such officer or officers may have been elected or appointed in a larger amount, such subsequent act or acts shall control. Any other act of the legislature adopted prior to October 1, 1935, decreasing or diminishing the salary, fees or compensation of any such officer or officers, during the term for which such officer or officers may have been elected or appointed, shall be effective from and after the first day of the month next succeeding the date of the ratification and adoption of this amendment, or from and after the adoption by the legislature of any such act decreasing or diminishing the salary, fees or compensation of such officer or officers."

In the case of **Houston County v. Martin**, 232 Ala. 511. 169 So. 13, the Supreme Court, after quoting the Sparks Amendment in full, and particularly the part quoted supra, uses the following language:

> "The language * * * is conclusive that further legislation was contemplated, and if such further legislation was enacted before the adoption of this amendment it should be effective 'from and after the first day of the month next succeeding the date of the ratification and adoption of this amendment.' If it was enacted subsequent to the adoption of the amendment, 'from and after the adoption by the legislature of any such Act.'"

The authorities you cite in your request state correct propositions of law. However, it is my opinion that the Sparks Amendment, Article XXIV

suspended protection given to jury commissioners by Section 281 of the Constitution and it is my opinion that jury commissioners were entitled to draw only such compensation as provided by the Acts of the Legislature, Extra Session, 1933, page 136, from and after September 2, 1933, notwithstanding the fact that the jury commission had a definite term of office and were appointed prior to the 1933 Act.

The validity of the Sparks Amendment has been upheld in the case of **Storrs v. Heck,** 190 So. 78.

Yours very truly,

THOMAS S. LAWSON.

Attorney General.

September 12, 1939.

Hon. Vernol R. Jansen,
Attorney for Board of Revenue and Road Commissioners,
Mobile County,
Mobile, Alabama.

Counties—Courts of County Commissioners, Boards of Revenue or other like governing bodies of the various counties are not liable for interest unless made so by statute or contract, except on its bonds and coupons after maturity.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your letter of August 11, 1939, requesting official opinion as follows:

"The Board of Revenue and Road Commissioners of Mobile County, Alabama, purchased road machinery from J. D. Adams & Company on a contract providing for installment payments. There was no agreement to pay interest. These installments were not promptly paid and the entire balance was in arrears, and about one year ago their representative appeared before the Board and asked the Board to agree to pay interest on these delinquent installments.

"The Board thereupon passed a resolution which recited that in view of the forbearance on the part of the J. D. Adams Company, it was agreed that these installments should bear interest and when the account was fully paid, a claim was to be filed by the company for 6% interest on the delinquency of such payment. This claim was recently filed in the sum of $138.90.

"After the passage of the resolution, but before the filing of the claim, the old Board went out of office and a new Board entered on the

discharge of these duties. They had been advised that the County could not pay interest on claims unless the original agreement provided for its payment and they declined to pay the claim.

"In correspondence with the Board, the J. D. Adams Company has agreed to accept the opinion of the Attorney General as final, and the Board has requested me to submit the inquiry to you for your opinion.

"In explanation of my opinion, let me say that I do not believe forbearance is a valuable consideration to support the new agreement, because there is no benefit to the taxpayers of Mobile County by reason of such forbearance. If an individual is threatened with suit, and in consideration of the creditor forbearing to press his claim he agrees to certain new terms, the contract is good, but neither Mobile County nor its citizens received any benefit by reason of this forbearance. The only remedy J. D. Adams Company had was a mandamus to require the issuance of a warrant when this claim had reached a point where it was due to be paid if funds were in the treasury. The claim had already been audited and allowed, but warrants were not issued because no funds were available, as these funds were being used to pay current obligations.

"If you find it necessary to secure additional information or a copy of the resolution before you can pass on this question, please let me know and I will furnish whatever you need."

In reply to your inquiry, attention is directed to the case of **Jefferson County v. City of Birmingham,** 235 Ala. 100, 178 So. 226, wherein the Supreme Court of Alabama said:

"The general rule is that counties are not liable for interest unless made so by statute or contract, except on its bonds and coupons after maturity. 7 R. C. L. 962; Duval County v. Charleston E & C. Co., 101 Fla. 341, 134 So. 509, 518."

I would also like at this point to call attention to another well established principle of law, that is, that when a claim against a county has been audited and allowed by the Commissioners' court, it bears no interest either from the day of allowance or from the day of its subsequent registration. **Vincent v. Gilmer,** 51 Ala. 387; **Hasty v. Marengo County Bank,** 206 Ala. 280, 89 So. 433.

It will be observed from the propositions of law heretofore reviewed that a claim against a county which has been audited and allowed does not bear interest and further that counties are liable for interest only when made so by statute or contract, except as to its bonds and coupons after maturity. There is no statute which would require the Board of Revenue and Road Commissioners to pay interest on installments due the J. D. Adams Company for road machinery which had become past due, and, therefore, it follows that the only question for us to consider is whether interest on the delinquent payments is due by contract. We think not. From the facts presented in your inquiry, it is noted that the original contract did not contain a condition that interest should be paid by the County on any installments due the J. D. Adams Company for road machinery which might become past due. The only ground upon which the J. D. Adams Company can claim interest on the past due installments is based upon a resolution which was adopted by the governing body of Mobile County on the 3rd day of January, 1938. Said resolution is as follows:

"BE IT RESOLVED, by the Board of Revenue and Road Commissioners of Mobile County that in consideration of the J. D. Adams Company forbearing to demand immediate payment of a debt owed them of $3,251.85 for machinery purchased, and the acceptance by said company of the herein described terms of payment, that this Board does hereby agree to pay said company $250.00 per month upon the principal of said sum beginning December 16th, 1937, that this Board further agrees to pay interest on all unpaid balance of the principal sum after December 16th, 1937, at the rate of 6% per annum, the interest being payable after the payment of all of the principal."

It will be noted that forbearance on the part of the J. D. Adams Company in demanding immediate payment of its claim against Mobile County is given as the consideration for the resolution authorizing payment of interest. In 13 Corpus Juris, page 342, Section 193, we find the following statement:

"But forbearance to do, or a promise to forbear from doing, that which the promisee cannot legally do is no consideration for a promise." **Citing Clark v. Jones,** 85 Ala. 127, 4 So. 771, **Prater v. Miller,** 25 Ala. 320, 60 Am. D. 521, **Martin v. Black,** 20 Ala. 309.

In our opinion, the above principle of law is applicable to the proposition here involved. The claim of the J. D. Adams Company against the county had been audited and allowed by the county governing body and therefore the county could not be sued for the same. The only remedy which the J. D. Adams Company had was a right to proceed by mandamus to compel the levy of a tax, or against the treasurer, if he had failed without sufficient excuse to make payment. **Commissioners' Court v. Moore,** 53 Ala. 25. In the case of **Rhodes v. Marengo County Bank,** 205 Ala. 667, 88 So. 850, the court made the following statement which seems to clearly show the position of the J. D. Adams Company in regard to the delinquent payments due them for road machinery by Mobile County:

"If the fact were that the commissioners' court had levied taxes to the limit of its authority—and as to that no question is raised in this case—and the county's entire income were necessary to meet its legitimate expenses for governmental purposes, and there were no surplus in the treasury to the credit of the general fund of the county, petitioner could only await the time when the proper conduct of county affairs would produce a surplus from which he might be paid. **J. B. McCary Co. v. Brunson,** 204 Ala. 85, 85 South. 396."

It therefore follows that Mobile County was not benefitted by the resolution, supra. The J. D. Adams Company has no rights against the county which it could have enforced at the time the resolution was passed, and, therefore, the forbearance to demand immediate payment of their debt does not constitute sufficient consideration for a new contract. The resolution, supra, failing for the want of consideration, leaves only the original contract which makes no mention of interest, and, therefore, it would be unlawful for the Board of Revenue and Road Commissioners' to pay the claim of the J. D. Adams Company.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 13, 1939.

Hon. John Ben Darden,
Tax Assessor,
Chambers County,
LaFayette, Alabama.

Tax Assessor—

Where Tax Assessor unable to find party who has interest in property and unable to obtain names of other persons who have interest in property, property should be assessed as "Owners unknown."

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of August 15, 1939, in which you request my opinion as follows:

"As Tax Assessor I assessed a piece of property to Floyd Adams Et Als. Floyd Adams has an interest in the property along with other persons unknown. I have been unable to find Floyd Adams or to obtain the names of the other persons who have an interest in the property.

"Please give me your opinion as to which one of these three listings should be used in order that the assessment will be correct and support a tax sale, 1. Floyd Adams Et Als, 2. Floyd Adams and other owners unknown, 3. "Owners Unknown."

"I refer you to opinions rendered by your office March 15, 1929 (Biennial Report, Attorney General, 1928-1930, p. 232) and Quarterly Report of the Attorney General October 1935 to December 1935, also section 53 of the Alabama Revenue Law."

Answering your request, I call your attention to General Acts of the Legislature, 1935, pp. 284-285, Section 53, which provides as follows:

"Section 53. Whenever the tax assessor knows or learns of any property, real or personal, subject to taxation in his county, the owner of which he does not know, and which is not embraced in any tax return made to him or before the third Monday in January by any taxpayer, he shall list and make upon the proper blank a return describing said property according to the best information he can obtain and assess the same 'owner unknown' at sixty per cent of a fair and reasonable market value, and in any notice or advertisement or motion for decree of sale it shall be described as so returned; and he shall also note the failure of the owner to make such return, and shall also note the accrual of the penalty of ten per cent of the taxes to be assessed thereon. No lands shall be returned 'owner unknown' until the Assessor shall have made a demand upon the person, if resident in the county, or by registered mail, if non-resident, whose address is known, to whom such lands or property was last assessed, and the said assessor shall make a diligent inquiry to ascertain the name of the owner of said lands or property. Any as-

sessor or deputy assessor who fails to comply with the requirements of this section shall be guilty of a misdemeanor, and fined not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00)."

The Attorney General has ruled that "an assessment of 'estate of' or 'heirs of' decedent is void and will not support a tax sale." Quarterly Report of Attorney General, Vol. I, page 61; Quarterly Report of Attorney General, Vol. VII, page 224; Quarterly Report of Attorney General, Vol. X, page 91.

"An assessment of property in the name of administrator, executor, or trustee, where legal title to the same reposes in the person to whom it is assessed is legal and proper." Quarterly Report of Attorney General, Vol. III, pages 202, 203; Biennial Report of Attorney General, 1936-38, page 263.

"In making 'owner unknown' assessment both for current and 'escape' assessment, assessor must give notice as required by Section 53 of the Revenue Act to person to whom such property was last assessed; and must make diligent inquiry to acertain owner. Your record should affirmatively show the making of or the attempt to make the service of the demand therein required." Quarterly Report of Attorney General, 1934-36, page 817.

"In making the owner unknown assessments, you should follow strictly the provisions of Section 53 of the 1935 Revenue Act." Biennial Report of Attorney General, 1934-36, page 817.

"Where property sold for taxes under name of other than owner, the sale is invalid." Biennial Report of Attorney General, 1934-36, page 43.

"An assessment may be corrected during the tax year, by entering thereon the name of the owner of the lands, at any time before the Probate Court enters decree of sale." Quarterly Reports of Attorney General, Vol. III, page 203.

Specifically answering your inquiry from the facts submitted, I am of the opinion that if you strictly follow the provisions of Section 53 of the Revenue Act of 1935 and assess the property to "owners unknown" then in the event of a sale of the property for taxes, such an assessment will support a tax sale.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 14, 1939.

Hon. G. W. Cuninghame,
Register, Marengo County,
Linden, Alabama.

Commissions—A commissioner appointed under Section 9326 of the Code of 1923 is allowed commissions in the discretion of the court not to exceed two and one half per cent of the collections and in no

case more than one hundred dollars (Sections 9327 and 5923 of the Code of 1923).

Opinion by Assistant Attorney General McCall.

Dear Sir:

In have your request for official opinion of July 28, 1939, which is as follows:

"Re: Rate of commission due Commissioner.

"Will you please advise me what per cent a Commissioner appointed by the Court is entitled to for making sale of real estate sold by order of the Court for division, and whether or not the presiding Judge can fix the rate of commission. In several land cases sold for division among joint owners, I have been appointed Commissioner to make the sale, and am not quite clear on what is the correct rate of commission for making such sales.

"Your immediate reply to this will be much appreciated, as I have two such cases pending in my Court at this time."

I am assuming that you were appointed a commissioner by authority of Section 9326 of the Code of 1923. The fees allowed under such appointments are governed by Section 9327 of the Code of 1923, which is as follows:

"9327. Payment and distribution of the purchase money.—Such commissioner may discharge himself from all liability for money received by him for the property sold, by paying over the same to the judge of probate, after deducting therefrom the costs and expenses attending the sale, **including commissions to him at the same rate that executors or administrators receive for collecting, but in no case more than one hundred dollars;** and such net proceeds must be distributed by the judge of probate among the persons entitled thereto, according to their respective interests." (Italics supplied).

The commissions allowed executors or administrators for collecting is governed by Section 5923 of the Code of 1923, which is as follows:

"5923. Compensation to executors or administrators.—Executors and administrators may be allowed such commissions **on all receipts** and disbursements by them, as such, **as may appear to the probate court to be a fair compensation for their trouble, risk, and responsibility, not to exceed two and one-half per cent on the receipts,** and the same percentage on the disbursements; and the court may also allow actual expenses, and, for special or extraordinary services, such compensation as is just, and such premiums as he may have paid a guaranty company for making his bond." (Italics supplied).

Under this section the amount of commission allowed an executor or administrator are within the sound discretion of the court not exceeding the maximum herein fixed, viz: two and one-half per cent of the receipts.—

Boyte v. Perkins, 211 Ala. 130, 99 So. 652; **Collins v. Clements,** 199 Ala. 618, 75 So. 165.

There is an additional maximum limitation under Section 9327 of the Code of 1923, supra, of one hundred dollars. Therefore, the amount of the commission as allowed a commissioner appointed under Section 9236 of the Code of 1923, supra, would be within the sound discretion of the court not to exceed two and one-half percent of the collection and in no case more than one hundred dollars.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 14, 1939.

Hon. J. Bruce Henderson,
Senator, 22nd District,
Capitol.

Gasoline Tax—

1. Section 2 of Local Act (House Bill No. 919 by Wallace or Senate Bill No. 398 by Henderson) pending in the Legislature of Alabama held not to be a diversion of gasoline taxes.

2. Omission of Section 2 of Local Act (House Bill No. 919 by Wallace or Senate Bill No. 398 by Henderson) pending in the Legislature held to render said act unconstitutional.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 8, 1939, in which you request my opinion as follows:

"Enclosed is a copy of House Bill No. 919 by Wallace or Senate Bill No. 398 by Henderson.

"1. Granting that it is a fact that the $200,000.00 in bonds as stated in Section No. 1 of this act were issued entirely for the construction of highways in Wilcox County, will you please advise whether Section 2 of that bill provides a diversion of the gas tax funds which is contrary to the provisions of the general laws of the State of Alabama and which is not now already authorized by the general laws of the State of Alabama?

"2. If the act is amended by striking paragraph No. 2 would this in itself make the act unconstitutional in view of the fact that we have advertised the act as a whole?"

In a conference had with you concerning the questions contained in this request, you stated that the amount of the gasoline tax given to your county by the State which would be used under the terms of the proposed local act here considered to pay this past indebtedness incurred for building or maintaining roads and bridges, would not exceed one-third of the amounts so received. I am therefore basing my answer upon this information.

Section 2 of your local act which is attached to your request provides as follows:

"Section 2. INTEREST ON WARRANTS AND REPEAL OF THE SPECIAL 2½ (TWO AND ONE HALF) MILLS ROAD AND BRIDGE TAX: After the first $100,000.00 (One hundred thousand dollars) of now existing gas tax warrants are paid the Court of County Commissioners of Wilcox County, Alabama, shall discontinue the levy of 1½ (One and one half) mills of the present 2½ (Two and one half) mills of Special Road and Bridge Tax now levied in Wilcox County, Alabama, which is now used for the payment of interest on the $200,000.00 (Two hundred thousand dollars) in bonds which were issued on May 1, 1919 and which mature on May 1, 1949. At the same time they shall by proper action provide for adequately supplementing the returns from the remaining one mill of Road and Bridge Tax from the gas tax funds of Wilcox County, Alabama, in order to meet the interest due on the said $200,000.00 (Two hundred thousand dollars) in bonds. After an additional $100,000.00 (One hundred thousand dollars) of now existing gas tax warrants are paid the said court shall discontinue the levy of the remaining 1 (One) mill of Special Road and Bridge Tax now levied in Wilcox County, Alabama. In case of an increase or surplus of the gas tax funds at any time and if at the discretion of the Court of County Commissioners, it shall by proper action provide for the payment of the proper refunding of said bonds and for the payment of the interest on the $200,000.00 (Two hundred thousand dollars) of now existing bonds issued May 1, 1919 and maturing May 1, 1949 out of the gas tax funds of Wilcox County it shall then discontinue the 2½ (Two and one half) mills Special Road and Bridge Tax now levied in Wilcox County, Alabama."

It appears that your local act, supra, is intended to repeal and replace the constitutional levy made for road and bridge construction and maintenance, as provided by Section 215 of the Constitution of Alabama, in the manner provided for by your local act from the gasoline excise tax given to Wilcox County, as provided by general law.

In my judgment, the purposes set out in your local act above referred to by you cannot amount to a diversion of the gas tax funds as long as not more than one-third of such funds are so used. I wish to refer you to an opinion of the Attorney General under date of February 1, 1939, addressed to Hon. J. C. Grady, Judge of Probate, Chambers County, and reported in Quarterly Report of Attorney General, Vol. XIV at page 89. See also opinion of the Attorney General, Vol. XV at page 93. I enclose copies of the above named opinions for your conveience.

In reply to your second question, I wish to advise that I note from the attached newspaper notice that you have published your proposed local act verbatim. In my judgment, you have given notice in such detail that the public is relieved of any duty of inquiry concerning details of the act and have the right to expect the published notice to coincide in material aspects with the act as finally passed by the Legislature.

In the case of **State ex rel. Wilkinson v. Allen,** 219 Ala. 590, 123 So. 36, our Supreme Court ruled upon such circumstances in very clear terms as follows:

> "It is well understood that the Legislature has the power 'to shape up and work out the details of local legislation,' and that all such details need not be embraced in the published notice. McGehee v. State, supra; Polytinsky v. Johnston, supra; First Nat. Bank v. Smith, supra. But where such principle has been applied the substance of the legislation was published in general terms. Where, instead of the publication being in general terms, the details of the proposed act are published, this principle has not been given effect. * * *
>
> "To accomplish these objects section 106 of the Constitution requires that the substance of the act must be published in advance. It cannot have the desired effect if the publication states details of substantive features different materially from the act as passed. If the details are not published but only the general nature of its substantive features, the public is put upon inquiry as to such details, and bound by a failure to inform itself, continuing through such changes and amendments as may stay within such substantive features as published. But if the publication gives details, the public need not pursue the inquiry further in respect to such details; for the information is complete, and it has the constitutional right to assume that such details will not be materially changed throughout the journey of the bill to its final passage and approval."

Premises considered, it is my judgment that the omission of Section 2 of this proposed local act, quoted supra, would be a material change from the Act as advertised and would necessarily violate the inhibitions of Section 106 of the Constitution of 1901 and therefore render this act invalid. See **Shades Valley Land Co. v. City of Homewood,** 235 Ala. 462, 179 So. 815.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 14, 1939.

Hon. Brooks Toler,
State Forester,
Montgomery, Alabama.

Department of Conservation—State Forestry Commission—There is no liability on co-operators who enter into cooperative agreements under the provisions of Section 989 of the Code of 1923, as amended, with State Forestry Commission in case of accident.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of August 8, 1939, which follows:

"Under Section 989 of the 1923 Code of Alabama as amended March 2, 1937, the Forestry Commission was empowered to enter cooperative agreements with private individuals. The following is that part of the above referred to Section which made cooperation by agreements possible:

" 'The Commission may take such measures as may be reasonable and practicable to prevent and suppress forest fires and other influence harmful to forest growth, and may apply such parts of the State Forestry Fund and other funds accruing to it as may be necessary to such purposes and to providing such systems of control as it may establish, either independently or in cooperation with the Federal Government and other agencies, public or private. The Commission shall be the sole State cooperating agency in joint work in the promotion and development of forestry and other matters and interests devolving upon it by law, among all classes of land ownerships in the State, in which both the State and the Federal Government may have financial or administration participation.'

"Under the Department of Conservation Act of 1939 the powers and duties of the Commission of Forestry were transferred to the Division of Forestry, Department of Conservation; and in furthering fire control promotion the Division of Forestry has entered into contracts with private land owners for this work. A copy of the contract is hereto attached.

"Several of the private cooperators have requested an opinion regarding liability in the event of an accident which may occur by a State Employee while working on the cooperator's land. The State Employees use trucks and automobiles in the performance of their duties upon such land. In the event of an accident would (1) the private cooperator be solely liable for injury or damage; (2) would the private cooperator be jointly liable; (3) would there be no liability on the private cooperator?"

In reply to your request, I beg to advise that, in my opinion, under the agreement attached to your request, the Division of Forestry, Department of Conservation of the State of Alabama, would be an independent contractor and in the event of accident, the land owner entering into such agreement, would not be liable either jointly or individually.

It is a well settled rule of this State that where a person or corporation enters into a contract with another to perform a certain act or do a certain thing, and the person who employs the other, does not reserve unto himself any control or supervision over how or by what means the work is to be performed, relieves himself of liability in the case of accident and injury to those employed by the employee. In other words, the agent or person contracted to do the work would be an independent contractor, and in the case of accident, he alone would be liable therefor. **Sloss Sheffield Steel and Iron Co. v. Gardner,** 17 Ala. App. 363, 85 So. 40; **Porter v. T. C. I. R. R. Co., 177** Ala. 406, 59 So. 255.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 14, 1939.

Hon. Frank M. Dixon,
Governor of Alabama,
Capitol.

Statutes—

Act No. 414 (S. 495), approved September 12, 1939, held constitutionally enacted, Senate Resolution No. 147, and the entries on the Journal of the Senate in regard thereto, to the contrary notwithstanding.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 14, 1939, in which you request my opinion as follows:

"I recently signed a bill passed by the Legislature amending what is commonly referred to as the Booth Bill. I refer to Act No. 414, approved September 12, 1939.

"The House and Senate of Alabama, at the time that the respective houses passed the last mentioned act, adopted resolutions for clarifying purposes. The question has been raised by some interested parties that the Senate resolution shows a reservation on the part of the Legislature in the passage of the so-called Booth Amendment.

"I request your opinion as to whether or not the passage of the resolution in any way affects the constitutionality of said Act No. 414, approved September 12, 1939."

At the outset, it may be stated that a transcript of the Journals of both the House of Representatives and the Senate of Alabama relating to the passage of Act No. 414 (S. 495), approved September 12, 1939, has been examined, and in my opinion said act was enacted in accordance with all requirements of the Constitution of Alabama of 1901 in regard to the enactment of legislation, unless Senate Resolution No. 147, by Mr. Simpson, and the other Journal entry of the Senate in regard to said resolution, have the effect of resulting in an action on the part of the Senate in regard to concurrence in the House amendment to, or substitute for, the original bill out of which said act grew (S. 495) that was not a concurrence in the House amendment or substitute in compliance with the provisions of Section 64 of the Constitution of Alabama of 1901.

This section of our Constitution reads in pertinent part:

"No amendment to bills by one house shall be concurred in by the other, unless a vote be taken by yeas and nays and the names of the members voting for and against the same be recorded at length on the Journal * * *."

We hereinbelow set out the excerpt of the Journal of the Senate for the 46th Legislative Day from the time Senate Resolution No. 147, by Mr.

Simpson, was introduced until the Senate finally passed the Bill (S. 495), which is now Act No. 414, after having concurred in the House amendment to, or substitute for, the original bill, if the Senate did, as a matter of law, concur in the same (that being the question to be determined):

"Senate Resolution

By Mr. Simpson

"SR147—Resolved, that the Senate accept and concur in the House amendment to S. 495 solely on the basis of the construction placed thereon and as set out in the telegram of John M. Carmody, Federal Works Administrator, the author of the amendment, a copy of which, together with the Governor's letter forwarding the telegram to the Chairman of the House Committee on Municipal Organization, is attached to and made a part of this resolution."

"GREAT SEAL
STATE OF ALABAMA

September 6, 1939.

Hon. L. H. Ellis, Chairman
Committee on Municipal Organization
State Capitol.

My dear Handy:

I hand you herewith a certain amendment to Senate Bill 495 suggested by Mr. Carmody, the Federal Works Administrator, together with copy of a telegram this day received from Mr. Carmody.

Inasmuch as Mr. Carmody has stated that this amendment is satisfactory to him, and it seems to dispose of all matters in controversy in this connection, I urge that your committee submit and recommend for adoption the amendment to Senate Bill 495 as enclosed.

Yours very truly,

Frank M. Dixon, Governor

FMD-m

For the purpose of aiding in any question of construction by the courts of the enclosed amendments, I suggest that copy of Mr. Carmody's telegram be spread on the journal of the House."

"Washington, D. C.
September 6, 1939.

"HON. FRANK DIXON, GOVERNOR,
MONTGOMERY, ALABAMA.

I have your telegram of yesterday afternoon quoting a proposed amendment of Section Six of the Booth Bill. Such amendment would leave the act applicable to any construction beyond the corporate limits

of any agency unless two conditions now exist: First, contracts for all construction or acquisition beyond the city limits must already have been executed, and, second, a loan or grant must have been made or be under commitment. Such amendment would not accomplish the true purpose.

In order to meet, insofar as possible, the thought which may be behind such amendment, we suggest that Section Six be amended to read as follows:

> "Section Six. Nothing in this act shall be deemed to require the purchase of or payment of compensation for any existing plant or distribution system within the corporate limits of any agency in which the construction of an electric distribution system has been authorized by an election held prior to the approval of this act, nor shall this act apply with respect to any project for which loans or grants have been made or are under contract to be made by the United States through the Federal Emergency Administrator of Public Works, the Federal Works Administrator, the Commissioner of Public Works, the Federal Works Agency or the Public Works Administration.'

You will observe that this amendment differs in two particulars from the one you quote. First, it is required that the loans or grants for the project be under contract instead of commitment. We believe both meanings are the same but the changes are made to make it unmistakably that nothing is hidden. Second, it eliminates the requirement that all work on any project extending beyond a city limits be now under construction or contract. I cannot say that all contracts have been executed for all work in connection with existing projects. For instance you will understand that service connections are not installed unless and until a contract for service is entered into between the agency and the customer, and that customers are obtained progressively.

The amendment above quoted could not, in my opinion, be construed to except from the act future extensions outside of city limits beyond and after completion of the project for which a loan or grant has been made or is under contract.

JOHN M. CARMODY, ADMINISTRATOR."

"And the Resolution, SR 147, was adopted by the Senate.

HOUSE MESSAGE

On motion of Mr. Simpson, and in accordance with Senate Resolution No. 147, the Senate concurred in and adopted the following substitute by the House, to the bill, S. 495, the title of which is set out in the foregoing Message from the House, to-wit:

(Subtsitute is set out in full in Senate Journal).

Yeas 27 Nay 1

Yeas:

Messrs.: Booth, Boyd, Calhoun, Clayton, Cooper, DeVane, Dozier, Guy, Harris, Harrison, Henderson, Hildreth, Holmes, Howard, Johnston, Lusk,

McCall, Malone, Poole, Rowe, Segrest, Simpson, Stakely, Street, Thomas, Tucker, Young.

Nay. Mr. Conway

And said bill, as thus amended, was again read a third time at length and passed.

Yeas 25 Nay 1

Yeas:

Messrs.: Booth, Boyd, Calhoun, Clayton, Cooper, Guy, Harris, Harrison, Henderson, Hildreth, Holmes, Howard, Johnston, Lusk, McCall, Malone, Poole, Rowe, Segrest, Simpson, Stakely, Street, Thomas, Tucker, Young. 25.

Nay. Mr. Conway 1."

If Senate Resolution No. 147, by Mr. Simpson, coupled with the Senate Journal entry that "on motion of Mr. Simpson and in accordance with Senate Resolution No. 147, the Senate concurred in and adopted the following substitute by the House to the Bill, S. 495 * * *" did not amount to a conditional concurrence by the Senate in the House amendment to, or substitute for, the bill, or did not amount to a reservation on the part of the Senate in concurring in the same, then the entries of the Senate Journal in regard thereto affirmatively disclose that the Senate concurred in the House amendment to, or substitute for, the bill in compliance with the constitutional requirement which is hereinabove quoted.

It is my opinion that the entries of the Senate Journal in regard to this matter show that the Senate did concur in the House amendment to, or substitute for, the bill in compliance with this constitutional provision. Senate Resolution No. 147, and the other Journal entry of the Senate in regard thereto, amount to nothing more than a statement of the motives or reasons of the Senate for concurring in said House amendment to, or substitute for, the bill. So far as the constitutional question before us is concerned, they may be ignored entirely. As a matter of fact, as I interpret the adjudicated cases in this State, such matters cannot be considered.

In writing to the question of whether or not the motives of the Legislature in enacting legislation may be considered by the Court in determining the constitutionality of the same, the Supreme Court of Alabama in the case of **Hawkins, Treasurer v. Roberts & Son and Morrow v. Earle,** 122 Ala. 130, 27 So. 327, spoke as follows:

"Whether that act is constitutional or not, must, at last, depend upon its own inherent merits or demerits.—whether by its terms, on proper construction it is within the sanction, or violative of the fundamental law. The act itself is the last expression of the legislative will, and for its intent and meaning, we must look to the instrument itself. Like a written contract entered into by private individuals, after negotiations therefor, the writing contains their ultimate intentions and conclusions, in respect to the transaction; and all previous negotiations leading up to its execution being regarded as merged therein. They have constituted the written instrument to be the authentic memorial of their contract, and because of this compact, the instrument must be taken as between them to speak the truth and the whole truth in relation

to its subject matter.—Robinson v. Mosely, 93 Ala. 70. The diligence of counsel have laid at our hands many adjudications and the expressions of textwriters on this subject. Mr. Endlich, in referring to the motives of legislators in enacting a statute, observes: 'Like the opinions expressed by legislators upon the passage of a statute, the motives and designs which actuated them in supporting it, cannot be inquired into by the court, in order to make the validity of an act depend upon the intention resulting from such an inquiry, even though, as in a quo warranto, the State be plaintiff.'—Endlich on Int. of Statutes, Sections 31, 32, and authorities there cited. The statute itself furnishes the best means of its own exposition; and if the sense in which the words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in its construction.'—Sutherland on State. Const., Section 237. The same authority again observes: 'It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of the instrument expressly provided, shall be exempt from its operation. * * * When that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity of the result is out of place. It is not the province of the courts to supervise legislation and keep it within the bounds of propriety and common sense.' —Ib. 238.

"In **Soon Hing v. Crowley,** 113 U. S. 703, the Supreme Court of the United States, in line with these text writers, on the same subject say: 'The rule is general with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements of their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.' We refrain from further quotation of authorities, on the question, many of which will be found cited in the brief of counsel for appellee, under their second proposition, but will add, that the principle announced seems to be of general if not universal acceptance."

In the case of **State ex rel Crenshaw et al v. Joseph et al.,** 175 Ala. 579, 57 So. 942, the opinion of the majority, written by Mr. Justice Sayre stated:

"We think rather that each of these acts is to be judged on its merits as they appear in the act itself. * * * And while our knowledge, in an undefined and irresponsible way, of conditions and opinions operating upon the Legislature at the time of these acts may be such as to create suspicion that the effort was to provide differently for each of the three largest cities of the state on consideration of local demands, not based on essential difference of situation, or the real interest of their inhabitants, **we cannot look beyond the act itself for motives."** (Emphasis supplied).

Recapitulating, briefly, I am of the opinion that the transcript of the Journals of both the House of Representatives and the Senate of Alabama in

regard to the passage of said Act No. 414 discloses that the same was enacted by the Legislature in compliance with the constitutional provisions in regard to the enactment of legislation; that Senate Resolution No. 147, by Mr. Simpson, and the other Journal entry in regard thereto, amount to nothing more nor less than a statement of the motives or reasons of the Senate for concurring in the House amendment to, or substitute for, the original bill (S. 495) out of which said act grew; that they may be properly ignored, and as a matter of fact, cannot be considered, in determining the constitutionality of said Act No. 414.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 15, 1939.

Hon. Jas. C. Brown,
Register, Circuit Court,
Tuscaloosa County,
Tuscaloosa, Alabama.

1. The fees provided by Section 4654, Code of Alabama, 1923, can only be taxed for a violation of the criminal law and is not a part of the costs where the State seeks to condemn property used for transporting liquors.

2. The fees provided by Section 3741, Code of Alabama, 1923, under sheriff's schedule of fees for mileage, etc., for transporting liquors has reference to criminal prosecutions and does not apply to condemnation proceedings in equity seeking to condemn personal property used for the transportation of liquors.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your request for official opinion of August 28, 1939, which is as follows:

"IN RE: **RULING ON SECTION 4654 OF CODE ETC.**

"Section 4654 of the 1923 Code of Alabama provides among other things a seizure fee of $3.00 for less than five gallons; $5.00 from five gallons to twenty gallons and $10.00 if more than twenty gallons for the seizure officers, but it speaks of 'upon conviction of the person in possession of vehicle at time of seizure' etc.

"I would greatly appreciate a ruling from you as to whether or not this Section 4654 would refer to the Equity side.

"In other words, on the Equity side of the Court, as I understand it, the proceeding is merely for the purpose of ascertaining whether or not the vehicle should be condemned and ordered sold for the illegal transportation of prohibited liquors, etc., whereas Section 4654 seems to refer to the person in possession of said vehicle at time of seizure.

"1. Now, the information I desire, is, should the Register collect seizure fees as provided for in said Section 4654 out of the proceeds of the sale of condemned vehicle or should he absolutely ignore said Section and let the Circuit Clerk collect same in the criminal proceedings on the law side of the Court against the person in possession of said vehicle at time of seizure?

"2. I also desire your opinion as to whether or not seizure officers should be allowed 'mileage fees' of ten cents per mile each way from the Court House by the Register, or, is that feature also to be ignored by the Register which Section 3741 provides for, being the 'Sheriff's Schedule of Fees'?

"Your prompt ruling on these two questions will be greatly appreciated as I have a few cases pending and desire to handle them in such way as required by law."

My answer to your first inquiry is in the negative. You will note that Section 4654, Code of Alabama, 1923, to which you refer, says that the fees set out in said section shall be taxed only on conviction, which, of course, has reference to criminal prosecutions, which means that these fees shall be taxed in criminal prosecutions and has no reference to condemnation proceedings in equity. The equity proceedings have to do only with condemnation of any vehicle seized while transporting prohibited liquors and do not have any reference to liquor seized.

As to your second inquiry, which is as to whether or not the sheriff is entitled to collect mileage where a bill is filed for condemnation of property such as vehicles which were used in the transportation of liquors, I answer again in the negative. You call attention to Section 3741 of the Code of Alabama of 1923, and I presume you are referring particularly to the following provision:

"When a sheriff captures or arrests a defendant with contraband or prohibited liquors or beverages, either with or without warrant, there shall be taxed in his favor against the defendant on conviction, in addition to any other fees and charges now allowed by law, ten cents per mile each way from the courthouse to the place of arrest, and all expenses for the transportation of the contraband or prohibited liquors and beverages from the place of arrest to the courthouse."

The above provision does not apply to condemnation proceedings in equity. You will note that it says, "there shall be taxed in his favor against the defendant on conviction * * *." I think this makes it clear that this applies only to criminal prosecutions and not to a bill in equity to condemn certain property used in the transportation of liquors. Proceedings in equity to condemn property used for the transportation of prohibited liquors are provided for by Sections 4778 and 4779 of the Code of Alabama of 1923. Sec-

tion 4782 relates to the fees etc. that are paid out of the sale of such forfeited property which has been condemned by a bill in equity.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 15, 1939.

Hon. Haygood Paterson,
Commissioner of Agriculture & Industries,
Montgomery, Alabama.

Corporations—Permit fees—

Corporations organized under the provisions of Act No. 220, page 604, General Acts of 1935, required to pay annual permit fee.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of September 8, 1939, which follows:

"The Mobile Farmers' Market, Inc., does not buy or sell commodities, it simply rents space to farmers on a non-profit basis, and all rental fees and revenue received by the market are put back into improvements.

"I desire your opinion as to whether this agency is liable for annual domestic corporation permit fees, under sub-section 15, House Bill 275, found on Page 610, Acts of 1935."

I have checked the records in the office of the Secretary of State and find that the corporation referred to in your request was incorporated under the authority and provisions of Act No. 220, H. B. 275, page 604, General Acts of 1935. Section 15 of said Act reads in pertinent part as follows:

"Section 15. Any corporation or association organized hereunder shall pay to the State the annual permit fee of ten dollars now required by law."

It will be seen from the clear and unambiguous language of the above section, that all corporations organized under the provisions of said Act are required to pay the permit fee as therein provided.

It is, therefore, my opinion that the corporation referred to in your request is liable for the annual domestic corporation permit fee as provided by Section 15 of Act No. 220, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 19, 1939.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Deed from trustees to beneficiaries of trust held subject to deed tax.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 9, 1939, in which you request my opinion as follows:

"Please furnish me an opinion on the following question:

"Several years ago a man and his wife conveyed to a national bank in trust for trustors and their child certain property by instrument in writing recorded soon after its execution. Under the trust agreement, the bank was to receive a commission on the income of the trust property for its services as trustee. The property described in the trust agreement was conveyed to the bank as trustee with power to sell and dispose of same and to reinvest the proceeds derived from same in its reasonable discretion. Since the execution of the trust agreement, one of the trustors has died and the trustee bank has made a conveyance transferring and conveying the trust property back to the surviving trustor and child.

"Apparently, the trustee is merely returning the trust property. Some of the trust property returned was purchased by the trustee out of the proceeds of the sale of a portion of the original trust property. On filing this latter instrument in which trustee conveys the property back to trustor and child, should the Probate Judge collect a deed tax on such instrument, when it appears from the paper that the title to the trust property is merely being merged and vested in the cestui que trust?"

The General Acts of the Legislature of Alabama, 1935, page 456, Section 46, provide in part as follows:

"Schedule 46. Deeds, bills of sales, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this state upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record * * *."

An examination of the deed from the trustee to the surviving trustor and child indicates that legal title was vested in the trustee, and a deed executed by trustee to the beneficiaries of the trust is subject to the deed tax. Vol. I, Quarterly Report of Attorney General, page 117; Vol. VI, Quarterly Report of Attorney General, page 106; Vol. VIII, Quarterly Report of Attorney General, page 132.

Legal title has remained in the trustee for some length of time and it appears that trustee has sold some of the original trust property and purchased new property.

In the case of **Hawkins v. Pure Oil Company,** 169 So. 307, 232 Ala. 660, Mr. Justice Gardner made the following statement:

"If, of course, the deed is for the purpose of acquiring title, even though on a nominal consideration, the exception would not be applicable as illustrated in the opinion of the Attorney General referring to a deed executed by an executor to carry out the will of the testator, and by which deed the legal title passes to the devisee.

"But this aside, our conclusion is that, in any event, this is not a deed for a perfection of title within the meaning of the exception. It is to preserve the evidence of the title and to place in record form the title already acquired. To such a deed the general rule, and not the exception in the statute, applies."

I am of the opinion that the deed to which you refer is liable for the payment of the deed tax.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 19, 1939.

Hon. Chester Walker,
Judge of Probate,
Tuscaloosa County,
Tuscaloosa, Alabama.

Mortgages to Federal Savings and Loan Association not exempt from filing tax.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 12, 1939, in which you request my opinion as follows:

"Enclosed herewith is a certificate from Jas. B. Little certifying that the Tuscaloosa Building & Loan Association, a corporation of Tuscaloosa, Alabama, has converted itself into a Federal Savings and Loan Association the name of which is First Federal Savings and Loan Association of Tuscaloosa. This instrument is self explanatory.

"The Tuscaloosa Building & Loan Association up to this time have paid mortgage tax in accordance with the Alabama law on all mortgages filed for record by them. The question I desire you to answer in connection with this inquiry is this 'Are mortgages made from various individuals in Tuscaloosa County to the First Federal Savings and Loan Association of Tuscaloosa required to pay the mortgage tax or are they exempt from mortgage tax as other Federal Mortgage Agencies and National Banks are now exempt?' It is my opinion that since the Tuscaloosa Building and Loan Association has converted itself into a Federal Savings and Loan Association that the mortgages made to them will be exempt from mortgage tax. Am I correct in my opinion?"

Your attention is called to 12 U. S. C. A. 1464 (h), which provides as follows:

"Such associations, including their franchises, capital, reserves and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States, and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

This office has heretofore ruled that mortgages executed to Federal Building and Loan Associations are not exempt from the mortgage tax on filing for record. Such associations are subject to the same fees and taxes as are Alabama Associations. Biennial Report of Attorney General, 1932-1934, page 639; Biennial Report of Attorney General, 1934-1936, page 147.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 19, 1939.

Hon. John R. Robinson,
Member, House of Representatives,
St. Clair County,
Ashville, Alabama.

Lotteries—Gift enterprises—

Under facts stated, plans held lotteries.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 11, 1939, in which you request my opinion as follows:

"Will you kindly favor me by letting me have your opinion on the following proposition which has to do with the lottery laws of the State of Alabama, and as a member of the legislature I am very much interested in.

"The proposition of a merchant to open a book in which any person over sixteen years of age may register as an applicant for employment and as each person registers a number will be assigned to the name of that person. Every Saturday night all of the numbers corresponding to all registrations to that date will be placed in a container and from that container one number will be drawn. If that person whose number is drawn was a customer of the store during the week in which the drawing took place and purchased from the store merchandise costing $1.00 or more, then this person drawn by number will be employed by the store as clerk for the following week at a compensation of $25.00. On the other hand, if the person whose number was drawn has not qualified by having been a customer as explained, the following week the amount of the compensation applicable to the person who might be employed would be $50.00 per week and so on until a number is drawn of an applicant who is qualified to be employed, after which time the amount of compensation will revert back to $25.00.

"Or another possible plan would be that every person visiting the store during the week would register and would be given a duplicate stub of registration, without requiring them to make any kind of purchase, and then at the end of the week a number would be drawn from a container and then the person whose name was drawn from the container would be placed in the employment of the store for the following week at the compensation of $25.00 a week, etc."

In my opinion, both of the plans detailed in your inquiry are violative of the lottery laws of the State of Alabama.

In the recent case of **Ex Parte Cecil Grimes,** 235 Ala. 192, 178 So. 73, in which the Supreme Court of Alabama outlawed the so-called "bank night" plan, Justice Bouldin states:

"Without dispute, a lottery has three elements: (1) a prize; (2) awarded by chance; (3) for a consideration."

The presence of the first two elements is without dispute in each of the plans which you submit. The prize is the employment in the store; the chance, of course, is the drawing. The question then arises as to whether or not there is a "consideration" within the spirit and purpose of the Alabama lottery laws. Paraphrasing the statement contained in the Grimes case, it might well be said that the very fact that these plans are business enterprises intended to swell the sales and the receipts of the store (whether this be accomplished by permitting registration free of charge and permitting any winner to receive his prize whether he has made a purchase or not, or whether the winner may receive the prize only after he has purchased a certain amount of merchandise during the week) evidences an intention to garner a profit from the gift enterprise. For practical purposes, the measure of the consideration moving to the store owner is the excess of receipts from sales made during the period in which the plan is carried on over what they would have been in the absence of such an attraction. As stated in the Grimes case, it is not of consequence whether either the business owner or the patron has figured just how much is the cost of the effort or inconvenience which is actually paid for the chance.

> " 'Gift enterprise' in the nature of a lottery, definitely covers a lottery in aid of legitimate business, through colorable gifts, but in fact prizes awarded by chance for a price." Ex parte Grimes, supra.

In a recent work entitled "Flexible Participation Lotteries", Hon. Francis Emmet Williams of the St. Louis Bar deals at great length with plans of the sort detailed in your inquiry and on page 85 of his book is found the following quoted from an article in the George Washington Law Review, May, 1936, p. 481, written by Judge John L. Thomas of the Supreme Court of Missouri:

> "Where a promoter of a business enterprise with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes."

Again, on page 267, Mr. Williams deals with a plan, similar to those detailed in your inquiry, known as "customers' pay day", and concludes that "the consideration is in the increase in business that the dealer expects and should secure in order to meet the cost of the 'free merchandise' distributed" to the participants. He concludes that such schemes in the retail trade afford a subtle means of inculcating the habit of gambling in old and young alike and will result in a serious menace to the moral, industrial and political well-being of the State.

It is, therefore, my opinion that to the extent that the patrons of the stores proposing to operate the plans detailed in your inquiry they have hazarded time and trouble and in some cases expense with the hope of obtaining the winning chances and that this time, trouble and expense constitutes a portion of what the operator of the plan bids for and is a part of the element of the consideration moving to him.

You are, therefore, advised that both of the plans are violative of the lottery laws of the State of Alabama.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 19, 1939.

Hon. Paul Roy Brown,
Superintendent of Education,
Walker County,
Jasper, Alabama.

Schools—County boards of education cannot expend funds for the purpose of renting caps and gowns to be used by high school graduates at graduating exercises.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 1, 1939, in which you request my opinion as follows:

"The Walker County Board of Education desires to rent caps and gowns to be used by the students of the High Schools of the County during their graduating exercises. This to be done by appropriate resolution of the Board.

"Under Code 1923, Section 868, the County Board of Education of Walker County now requests the opinion of the Attorney General on the following questions:

"'Has the County Board of Education the legal authority to rent caps and gowns to be used by the graduates of the County High Schools, during their graduating exercises, and to pay for same out of the general school fund derived from the County 4 mill tax?'"

I am of the opinion that your inquiry should be answered in the negative.

The county four-mill tax to which you refer is the three mills levied under Amendment III of the Constitution of 1901 and Sections 261-293 of the School Code of 1927, and the one mill levied under Sections 253-260 of the School Code of 1927. Both of these levies are for "public school purposes" in general, but may be limited to specific purposes such as the retirement of bonds, etc. (See Opinion of the Attorney General to Chief Examiner of Accounts on July 25, 1939.) For the purpose of this inquiry, I will assume the levies in question to be for "public school purposes" in general.

The fact that a county board of education desires to furnish the high school graduates with caps and gowns for the graduating exercises is very commendable. However, in my judgment, this is not such a "public school purpose" as to authorize the expenditure of public funds therefor. The wearing of a cap and gown at graduating exercises is not a necessary prerequisite to the securing of a diploma. (See **Valentine v. Casey Independent School Dist.**, 191 Iowa 1100, 183 N. W. 434, 187 Iowa 555, 174 N. W. 334.) Such is matter that is personal to the student, and public funds, in my opinion, cannot be expended for this purpose.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 19, 1939.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Costs—Appeals—When appellant is successful on appeal, and appellee proved insolvent, execution may issue against appellant and his sureties, for the costs actually created by appellant, but for none other.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 5, 1939, in which you request my opinion as follows:

"I respectfully request your opinion on the following, viz:—

"In a Civil case where judgment is rendered by the Circuit Court in favor of the defendant and the plaintiff appeals and gives security for costs of appeal and the Supreme Court or Court of Appeals reverses said judgment and taxes the costs of appeal against the Appellee (defendant) and execution is issued against said Appellee (defendant) for said costs of appeal, and said execution is returned by the Sheriff no property of Appellee (defendant) found in my County.

"Would it then become the duty of the Clerk to proceed by execution against the Appellant (plaintiff) and his sureties for the costs of appeal?"

In answer to your request, it is my opinion that you can issue execution against the appellant (plaintiff) for just such costs as were incurred by the appellant and at his instance incident to the appeal, and no other.

I call your attention to Section 7263, Code of Alabama, 1923, where it says:

"7263. When execution against plaintiff for his own costs; penalty for failure to collect, etc.—The clerk of the supreme court, court of appeals, clerks of the circuit court, judges of probate, and justices of the peace, and registers, upon return of an execution 'no property' against the defendant by the proper officer of the county in which the judgment was rendered, or, if the execution be from the supreme court, court of appeals, of the county from which the case was brought, may issue execution against the plaintiff, or against the plaintiff and sureties, or appellant and sureties as the case may be, for the costs actually created by the plaintiff, or appellant, but for none other * * *."

See Biennial Report of Attorney General, 1920-22, page 394. Biennial Report of Attorney General, 1936-38, page 642, Wooten et al v. Hecker, 136 Ala. 230, 33 So. 821.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 19, 1939.

Hon. Wm. A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Costs—Wills—

The provisions of Section 7805, Code of Alabama, 1923, do not apply to cases in the circuit court where parties contest validity of a will.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 5, 1939, in which you request my opinion as follows:

"I respectfully request your opinion on the following, viz:

"In contest of wills tried in the Circuit Court coming up from the Probate Court, if the defendant (the party contesting the will) fails, and execution is issued against said defendant for the costs and said execution is returned by the Sheriff no property of said defendant found in my County.

"Would it then become the duty of the Clerk to proceed to issue execution against the plaintiff (the party offering the will for probate), for the plaintiff's costs as is required in civil cases."

It is my opinion that Section 7805 of the Code of Alabama of 1923 does not apply to contest of wills in the circuit courts. This section is as follows:

"7805. When against plaintiff for his costs.—When execution against the defendant is returned 'no property found,' execution may issue against the plaintiff, in the name of the clerk or the register of the court, for all the costs created by him in obtaining his judgment."

There is a special provision made for costs in cases where the validity of a will is contested. I call your attention to Section 10632, Code of Alabama, 1923, which is as follows:

"10632. Costs of contest; how taxed and enforced.—The costs of any contest under the provisions of this article must be paid by the party contesting, if he fails; otherwise, it must be paid by the plaintiff, or out of the estate, or in such proportion by the plaintiff, or out of the estate, as the court may direct; and for the costs directed to be paid by the plaintiff or defendant, execution may be issued as in other cases; and the costs directed to be paid out of the estate may be collected as other claims against an estate are collected."

Special provisions relating to specific subjects control general provisions relating to general subjects, and things specially treated will be considered as exceptions to general provisions. **Herring v. Griffin,** 211 Ala. 225, 100 So. 202.

In an opinion of this office rendered to Hon. Chas. E. McCall, Chief Examiner of Accounts, January 4, 1924, Biennial Report of Attorney General, 1922-24, page 284, it was held that Section 7805, supra, did not apply to costs of justice courts. I think this applies with equal force to the probate courts where the validity of a will is being contested. Therefore, my answer to your request is in the negative.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 19, 1939.

Hon. Ben M. Smith,
The Adjutant General,
State Military Department,
Montgomery, Alabama.

National Guard—Armory Commission—

Armory Commission may, by condemnation proceedings, acquire private property for use as a target range for the Alabama National Guard.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of September 2, 1939, in which you request my opinion as follows:

"Your attention is invited to the attached letter, dated September 1, 1939, from Major Harry E. Smith, commanding officer, 3rd Battalion, 167th Infantry, at Birmingham, Alabama.

"Plans are now being considered which contemplate the acquisition of private properties on which a rifle range near Birmingham, Alabama was recently constructed for the Alabama National Guard on leased properties. This range site is composed of properties of several different private owners. It is feared that there may be some difficulty in obtaining a reasonable price from some of the owners.

"In view of the above condition is it requested that you advise the undersigned as to whether in your opinion the laws of the State of Alabama authorize instigation of condemnation proceedings against private property for the purpose of constructing or acquiring sites for target ranges for the Alabama National Guard."

I am of the opinion that your inquiry should be answered in the affirmative. Such authority is granted to the Armory Commission under Act No. 276, S. B. 362, approved August 23, 1935.

The pertinent parts of said act are as follows:

"Section 3. POWERS OF CORPORATION: Said Commission may in its corporate name sue and be sued, contract and be contracted with, acquire real and personal property by gift, purchase or condemnation; and may do all things and exercise all rights and powers reasonably necessary to carry out and perform the duties intended or required by this Act. * * *"

"Section 6. PROVIDING ARMORIES AND GROUNDS FOR TRAINING PURPOSES: The Armory Commission shall provide adequate armories, buildings, grounds, **and other training facilities** for the National Guard and Naval Militia of Alabama, for the purpose of drill, instruction and administration, and for the safekeeping of public property of the State of Alabama and the United States, issued to or for the use of the Alabama National Guard and Naval Militia, including animals, and for such purpose shall be charged with the administration and expenditure of the Armory Fund. All expenditures from said fund authorized by the Commission shall be made upon vouchers authenticated by the Adjutant General and approved by the Governor." (Italics supplied).

"Section 7. ACQUIRING BUILDINGS AND GROUNDS FOR ARMORY AND TRAINING PURPOSES: The Armory Commission may, either alone or in cooperation with the United States or political subdivisions of the State such as counties, cities or incorporated towns and private corporations, voluntarily unincorporated associations or individ-

uals, construct, or acquire by purchase, contract, lease, gift, donation, or condemnation, armories, **buildings, or grounds, suitable for drill instruction** and administration and the safekeeping of public property and make additions and improvements in or to such armories, and facilities, and either alone or with the like cooperation of others provide heat, light, water, telephone service, and other costs of operation and maintenance, including insurance. The amounts to be appropriated out of any Armory Funds for the construction and/or acquisition of armories, and for the maintenance and/or rental of armories shall, within the limits hereinbefore in this Section set forth, be wholly within the discretion of the Armory Commission." (Italics supplied).

"Section 11. POWER OF CONDEMNATION: The power of condemnation herein granted to the Armory Commission of Alabama, and to counties, cities and incorporated towns, shall be exercised in manner prescribed in the Code of Alabama."

From the above it will be seen that the State Armory Commission has the authority to acquire by condemnation proceedings, among other things, "buildings or grounds suitable for drill instruction." A target range, in my judgment, comes within the category of "buildings or grounds suitable for drill instruction." A target range is necessary in order that the members of the National Guard may be trained in the arts of weapons and musketry, which training is more important than training for parade drill, etc. Therefore, in my judgment, the authority to acquire by condemnation "buildings or grounds suitable for drill instruction" is sufficiently broad to include the acquisition by condemnation of a target range for the Alabama National Guard. Moreover, in my opinion "other training facilities" as used in Section 3, supra, includes target ranges.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 20, 1939.

Hon. W. H. Hines,
Commissioner, District No. 3,
Monroe County,
Monroeville, Alabama.

County not authorized to furnish Circuit Judge with typewriter.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your letter of August 31, 1939, in which you request my opinion as follows:

"Please advise me whether or not the Monroe County Board of Revenue may legally purchase for the office of the Circuit Judge, who

maintains his residence and office in said County, a new typewriter. The old machine is completely worn out and obsolete, and the Board is willing to purchase a new one to replace it provided they can legally do so."

I know of no provision of law which authorizes the county governing body to furnish a typewriter to the circuit judge.

The authority for counties to furnish various county officials with typewriters is found in Section 9604 of Michie's Alabama Code of 1928. Section 9604 is as follows:

"Section 9604. Stationery of officers paid for by county.—The judge of probate, tax assessor, tax collector, register of the circuit court in equity, clerk of the circuit court, sheriff and the county treasurer or custodian must be allowed reasonable expenses for suitable books, stationery, postage stamps used exclusively for official business, and telephones to be paid for by the county, on the approval of the court of county commissioners, board of revenue or other like governing body, and the judge of probate shall also be allowed expense for his seal of office, to be paid for by the county."

It was decided by the Supreme Court in the case of **Underwood Typewriter Company v. Marengo County Bank,** 203 Ala. 128, 82 So. 158, that typewriters were included within the term "stationery", and so the county officials designated in Section 9604, supra, could legally be furnished with typewriters by the county.

I also call your attention to Section 6732, Code of Alabama, 1923, which authorizes the county governing body to furnish the clerk of the circuit court with **typewriters,** books and stationery for the use of his office.

This office has heretofore held that under the provisions of Section 6741, Code of Alabama, 1923, that the court of county commissioners should furnish the court reporter with a typewriter. Biennial Report of Attorney General, 1926-28, p. 285.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 21, 1939.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

1. County may transfer funds from the general fund of the county to the road and bridge fund, or a portion of the same, if such transfer does not impair or endanger the payment of warrants having priority which are unpaid.

2. The county may set apart and appropriate money received from taxes on gasoline for the payment of bonds previously issued for the purpose of highway maintenance and construction.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 2, 1939, in which you request my opinion as follows:

"Your prompt opinion on the following points will be appreciated:

"(1) May a county pay emergency bills for highway maintenance and construction from the general fund and later reimburse such fund from the gasoline tax fund?

"(2) May a county use gasoline tax funds for retiring, or for creating a sinking fund for the purpose of retiring bonds previously issued for purposes of highway construction and maintenance?"

It is my opinion that Section 1397 (115) of Michie's Code of 1928 answers your request. This section is as follows:

"1397(115). Surplus from general fund of county transferred to road fund.—The court of county commissioners, board of revenue, or other like governing body of any county in this state may transfer to the road fund of the county any surplus of the general funds of the county in the county treasury, or any part of such surplus whenever, in the judgment of such court or board, it will promote the interest of the county to make such transfer. Any surplus of the general fund so transferred shall be used only for the working of the public roads or the building of bridges or otherwise improving the roads of such counties."

Of course, there are certain restrictions thrown around such a transfer. In the case of **Rhodes v. Marengo County Bank,** 205 Ala. 667, 88 So. 850, our Supreme Court lays down the following rule:

"While Act Sept. 22, 1915 (Laws 1915, p. 573), authorizes the transfer of any surplus of the general fund to road fund, a transfer of a portion of the general fund to the road fund cannot be justified under that act, where the county was much indebted, and there were warrants having priority unpaid."

The above simply means that you cannot make such a transfer from the general fund to the road and bridge fund of your county where by so doing you are likely to impair the general fund to such an extent that warrants having priority could not be paid. In other words, there cannot be said to be a surplus in the general fund until all preferred claims against the county, and all appropriations which the law makes mandatory **have been paid,** or adequate funds are on hand sufficient to meet all preferred claims. After this has been done, if a surplus remains, the court of county commissioners may lawfully transfer any such surplus to the road fund to be

used as provided by law. See Biennial Report of Attorney General, 1930-32, p. 446; **Ramage Park & Co. v. Parks,** 214 Ala. 661, 108 So. 580.

There must be strict compliance with the foregoing or else no such transfer is lawful. **Rhodes v. Marengo County Bank,** supra; **Mims, Treasurer v. Stallworth,** 180 Ala. 511, 61 So. 811.

My answer to your second inquiry is in the affirmative. This answer is based on General Acts of 1936, page 28, which is as follows:

> "Section 1. The Board of Revenue or court of county commissioners or other like governing body of each and every county in Alabama is hereby authorized and empowered to expend an amount not to exceed one-third of the total amount that may be received by each county from the levy and collection of any tax on gasoline in the payment of any debt that may have been herefore incurred by such county for the construction or maintenance of roads and bridges."

For this purpose you will note that you cannot appropriate more than one-third of the taxes that may be received by each county from the levy and collection of any tax on gasoline. See Biennial Report of Attorney General, Vol. XIV, page 89.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 22, 1939.

Hon. Wm. F. Black, Director,
Transportation Bureau,
Alabama Public Service Commission,
Montgomery, Alabama.

Common and contract carriers—

Bus used by society for purpose of conveying members to funerals, church, society meetings etc. not for hire held not within purview of Alabama Motor Carrier Act of 1931 or Motor Vehicle Act of 1932 under facts stated.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 14, 1939, in which you request my opinion as follows:

> "In re: Opinion as to whether or not a bus used by a society for the purpose of conveying its members and their families to funerals,

churches, society meetings, etc. comes within the purview of Alabama Motor Act of 1931 or an Act of the Legislature, approved October 28, 1932 (H. B. 113).

"A question has arisen in our Department as to whether or not a bus operated by a society with headquarters in Florence, Alabama, for the purpose of conveying members of such society and such members' families to funerals, churches, society meetings and o'her functions in which said society has an interest or participates comes within the purview of Alabama Motor Carrier Act of 1931 or an Act of the Legislature approved October 28, 1932 (H. B. 113).

"The society does not charge any fare for carrying such members to the above-mentioned functions; the only charge is the flat membership fee in said society. The bus is owned by the society and the driver of the bus is employed by the same. No differential is made as to dues between those who ride in the bus and those who do not, but a flat membership fee is charged regardless of whether or not said bus is used."

In my opinion, the bus used by the society as described in your inquiry comes neither within the purview of the Motor Carrier Act of 1931 (General Acts 1931, p. 303) nor of the act regulating contract carriers and common carriers approved October 28, 1932 (General Acts 1932, p. 178).

The 1931 Act referred to hereinabove invests the Alabama Public Service Commission with the authority to supervise and regulate "every motor transportation company" in the State of Alabama. A "motor transportation company" is defined as

"Any corporation, person, partnership or association * * * owning, controlling, operating and/or managing (1) an motor propelled vehicle not operated on or over rails, used in the business of transportation of passengers or property **for hire as a common carrier** over the highways in this State, or (2) any terminal or station facilities for passengers, freight or express transported by such company."

It will be noted that this definition limits a "motor transportation company" to one which operates "for hire as a common carrier." A "common carrier" has been repeatedly defined by the courts of this State as being one which undertakes for hire to carry all passengers, indifferently, who may apply for passage as long as there is room and which by virtue of its regular business undertakes to transport persons from place to place offering service to such as may choose to employ it and pay the required charges. **North American Accident Ins. Co. v. Pitts,** 213 Ala. 103, 104 So. 21; **Hood v. State,** 26 Ala. App. 507, 162 So. 541, 542; **13 C. J. S.,** Section 530.

The 1931 Act further limits the general definition of a "common carrier" to include

"only motor transportation companies operating between fixed termini or over a regular route and who hold out to carry for hire, so long as it has room, for all persons applying, or goods of every one bringing goods to him for hire."

It is obvious that under the foregoing definitions the society concerning which you inquire is not operating as a "common carrier" or as a "motor transportation company" within the purview of the 1931 Act.

The so-called Motor Vehicle Act of 1932 (General Acts 1932, p. 178) purports to regulate "contract carriers and common carriers * * * not subject to the provisions of the Alabama Motor Carrier Act of 1931." As used in the 1932 Act, a "common carrier means any operator of a motor vehicle who engages in the motor transportation business for hire as a public employment," other than those motor transportation companies or common carriers subject to the provisions of the Motor Carrier Act of 1931 (Section 1 (c)) Certainly, under the facts submitted in your inquiry, it cannot be said that the society is a "common carrier" within the meaning of the 1932 Act for the reason that, under the facts as detailed by you, the society is neither engaged in the motor transportation business, the bus being furnished as a convenience to the members only and not used for the general public, nor does it operate "for hire as a public employment" inasmuch as it appears that no charge is made for the use of the bus, the same being furnished without discrimination to all members and the same charges being made to all members regardless of whether they utilize the bus facilities or not.

Neither is the society a "contract carrier" within the meaning of the 1932 Act. A "contract carrier" as therein defined means

> "Any operator of a motor vehicle who engages in the business of furnishing transportation of persons or property **for hire** for a particular person or particular persons under a special contract or special contracts and not for the public."

It will be noted that one of the tests of whether an individual or society is a "contract carrier" is whether the transportation is "for hire." Certainly it cannot be said that the bus operated by the Florence society is contracting to furnish transportation for its members for hire. It will be noted further that the provisions of the act state that the term "contract carrier" shall not be contrued to mean or include "a cooperative association, when transporting only property belonging to the association, or its members, and when no profit is charged for such transportation." Section 1(d) 2). To my mind this clearly shows the legislative intent to except operations such as those inquired about from the provisions of the act.

You are, therefore, advised that the society concerning which you inquire would not be subject to regulation by the Alabama Public Service Commission under either the 1931 Act or the 1932 Act aforementioned.

The legal conclusion here reached is based entirely on the facts set out in the request for opinion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 22, 1939.

Hon. J. F. Brawner,
Director, Drivers License Division,
Highway Patrol,
Montgomery, Alabama.

Driver's licenses—Act No. 181 (General Acts 1939) approved March 18, 1939, and effective September 30, 1939—

1. A Judge of Probate or chief clerk administering affidavit of applicant for driver's license authorized to collect twenty-five cent fee therefor provided by Section 7285 of the Code of Alabama, 1923.

2. Clerks in office of Judge of Probate, other than chief clerk, not authorized to administer affidavit of applicant for driver's license unless commissioned as notaries public.

3. Affidavit of applicant for driver's license may be made before a notary public or any other officer authorized to administer oaths.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of August 3, 1939, in which you request my opinion as follows:

"Due to the several requests we have received regarding notarization of applications for drivers' licenses, we would appreciate an opinion on the following:

"Can Judges of Probate or their Chief Clerks or assistants charge a notary fee for notarizing the driver's license application?

"We are enclosing a copy of the driver's license application for your consideration."

You have subsequently advised me that this question is based on Act No. 181 (General Acts 1939) approved March 18, 1939, and effective September 30, 1939, which is the new Driver's License Law or Highway Patrol Act, and not on Act No. 331 (General Acts 1935, p. 756) approved September 2, 1935, which is the original Driver's License Law or Highway Patrol Act.

The provisions of the old Driver's License Law or Highway Patrol Act pertinent to this question are:

"Section 2. Such person shall apply under oath to the probate judge of the county of his residence for said driver's license or a renewal thereof, upon a form to be provided by the State Highway Department."

* * *

"Section 8. For each driver's license issued to the head of the family, for which fifty cents is charged, the probate judge shall be allowed a fee

of ten cents which shall be paid by applicant, and for each license issued for which twenty-five cents is charged, the probate judge shall be allowed a fee of five cents which shall be paid by applicant, which said fee shall include all compensation to the probate judge for performing all the duties herein prescribed. * * * The probate judge or any clerk in said office shall have the authority to administer oaths required on said applications and no charge shall be made for such service."

Under these statutory provisions of the original Driver's License Law or Highway Patrol Act, this office in an opinion to Hon. W. W. Hill, Judge of Probate, Montgomery County, Montgomery, Alabama, under date of October 7, 1934, Quarterly Report of Attorney General, Vol. I, page 22, held as follows:

"It is my judgment that the provision that the Probate Judge or any clerk in said office shall have authority to administer oaths required on said applications and no charge shall be made for such services, does not prevent or forbid the right of any officers authorized to administer oaths, to take the affidavit required on such applications. Of course, this does not relieve the Probate Judge of his duty of passing on the qualifications of the applicant.

"The question has been asked whether a clerk in the office of the Probate Judge, who is not a notary public or otherwise authorized to administer oaths, has the right to administer oaths under this Act. The statute specifically so authorizes and I, therefore, so hold.

"In your next question you ask whether the Probate Judge is entitled to the 2½ per cent for remitting the licenses collected under this section. I think this is answered by the first paragraph of Section 8, which is as follows:

" 'For each driver's license issued to the head of the family, for which fifty cents is charged, the Probate Judge shall be allowed a fee of ten cents which shall be paid by applicant, and for each license issued for which twenty-five cents is charged the Probate Judge shall be allowed a fee of five cents which shall be paid by applicant, which said fee **shall include all compensation to the Probate Judge for performing all the duties herein prescribed.**'

"This apparently is exclusive compensation to the Probate Judge and I, therefore, hold that the usual compensation of 2½ per cent for remitting license taxes does not apply to the driver's license. This is a special Act passed subsequent to the General Revenue Bill and contains this provision, and it appears to me to be the clear legislative intent that the compensation herein provided is exclusive."

The holding therein made to the effect that any officer authorized to administer oaths may administer the oath required of an applicant for driver's license has been subsequently re-affirmed by this office in an opinion to Hon. W. E. Butler, Judge of Probate, Madison County, Huntsville, Alabama, under date of October 24, 1935, Quarterly Report of Attorney General, Vol. I, page 115, and in a later opinion to Judge Hill under date of October 29, 1935, Quarterly Report of Attorney General, Vol. I, page 127.

The provisions of the new Driver's License Law or Highway Patrol Act pertinent to your inquiry are as follows:

"Section 2. Such person shall apply under oath to the Judge of Probate of the county of his residence for said driver's license or a renewal thereof upon a form which shall be provided by the Director of Public Safety. At the time of filing any such application, the applicant shall pay to the Judge of Probate a fee of $1.10, and the Judge of Probate shall give him a receipt therefor on a form provided by the Director of Public Safety."

"Section 3. * * * He (the Judge of Probate) shall also at said time deliver to the State Treasurer the amount of all such fees collected less ten cents (10c) for each application received or permit issued, which sum shall be retained by him, and shall be his sole compensation for performing any and all duties required of him under the provisions of this Act."

You will note that the proviso contained in the original act, which is hereinabove quoted, to the effect that "the Probate Judge or any clerk in said Probate Office shall have the authority to administer oaths required on said applications and no charge shall be made for such service" has been omitted from the new act. Therefore, the new act contains no authority for the Probate Judge or any of his clerks to administer the oath or affidavit required of applicants for driver's license under the provisions thereof, nor does it contain any prohibition against a Judge of Probate or his chief clerk collecting a fee for administering such affidavit if they administer the same under the general provisions of law investing them with authority to administer oaths or affidavits, which said fee is twenty-five cents, and is provided for by Section 7285 of the Code of Alabama, 1923.

The premises considered, I am constrained to hold:

1. A notary public or any officer authorized to administer oaths or affidavits may administer an affidavit required of applicants for driver's license under the new Driver's License Law or Highway Patrol Act, because the provisions of the original Driver's License Law or Highway Patrol Act and the provisions of the new Driver's License Law or Highway Patrol Act in regard to applicants for driver's license making application under oath to the Probate Judge for said driver's license have not been changed. See the opinions of this office, cited supra.

2. The Judge of Probate or his chief clerk under the general laws investing them with authority to administer oaths or affidavits may administer the affidavit required of an applicant for a driver's license, and for said services may charge a fee of twenty-five cents for administering affidavits provided for by Section 7285 of the Code of Alabama, 1923. You will note that the proviso of the new Driver's License Law or Highway Patrol Act last hereinabove quoted, which sets the fee of the Judge of Probate under the provisions of the new act, states that the fee there provided "shall be his sole compensation for performing any and all duties required of him **under the provisions of this act.**" (Emphasis supplied). I have already pointed out that the new act contains no authority or requirement for the Judge of Probate or his chief clerk to administer this affidavit which is required of applicants for driver's license, and that if the Judge of Probate or his chief clerk administer the same, they do so under the general laws investing them with authority to administer oaths or affidavits. It could not be said that when the Judge of Probate so acts he is performing a duty required of him under the provisions of the new Driver's License Law or Highway Patrol Act.

Attention is called to the fact that we stated hereinabove that when the Judge of Probate or his chief clerk administer this affidavit of an applicant for a driver's license, they **may** collect the fee of twenty-five cents provided for administering affidavits by Section 7285 of the Code of Alabama, 1923. This, of course, would have to be read as **must** in those counties in Alabama where the Judge of Probate is placed on a salary under or pursuant to the provisions of an amendment to the Constitution of Alabama, and is required to collect all fees which the Judge of Probate is authorized to collect under the general law and cover the same into the county treasury. The counties in which it would read **must** for that reason are the counties of Calhoun, Jefferson, Mobile, Montgomery and Tuscaloosa.

3. No clerk in the office of the Judge of Probate, other than the chief clerk, may administer the affidavit required of applicants for a driver's license under the new Driver's License Law or Highway Patrol Act unless such clerk is a notary public or such other officer as is authorized to administer oaths or affidavits. This for the reason that the provisions of the original Driver's License Law or Highway Patrol Act investing all clerks in the office of the Judge of Probate with such authority, as pointed out hereinabove, was omitted from the new Driver's License Law or Highway Patrol Act. However, it is respectfully suggested that all clerks in all probate offices in the State of Alabama may be commissioned as notaries public, and in such event, could administer the affidavit required of an applicant for a driver's license as such a notary public and would not be required to collect any fee therefor, even though such clerk, who is also a notary, might be a clerk in a probate office in a county wherein the Judge of Probate has been placed on a salary by virtue of or pursuant to the provisions of an amendment to the Constitution of Alabama and is required to collect all fees which the Judge of Probate is authorized to collect under the general laws and to cover the same into the county treasury.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 22, 1939.

Hon. William A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Costs—Appeals—

1. Where a defendant appeals a case to the Supreme Court and gives a supersedeas bond for double the amount of judgment and costs and the Supreme Court or the Court of Appeals reverses the judgment and taxes the appellee (plaintiff) with the costs of said appeal, execution is issued against said appellee (plaintiff) for said costs, returned by the sheriff "No Property Found," the appellant (defendant) would be responsible and his sureties also would be responsible if he made an appeal bond for the costs which accrued at his instance on the appeal.

2. Where a party appeals a case to the Supreme Court or Court of Appeals, executes a supersedeas bond and is successful in his appeal, the sureties on such supersedeas bond are not liable for costs which accrued either in the Supreme Court or Court of Appeals.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of September 5, 1939, in which you request my opinion as follows:

"I respectfully request your opinion on the following, viz:—

"In a civil case where the plaintiff recovers judgment in the Circuit Court against defendant we will say for $500.00 and costs, and the defendant appeals and gives Supersedeas Bond for double the amount of said judgment and costs and the Supreme Court or the Court of Appeals reverses said judgment and taxes the Appellee (plaintiff) with the costs of said appeal, and execution is issued against said Appellee (plaintiff) for said costs of appeal, and said execution is returned by the Sheriff no property of Appellee (plaintiff) found in my County.

"Would it then become the duty of the Clerk to proceed by execution against the Appellant (defendant) and his sureties for the costs of said appeal?"

My answer to your request is partly in the affirmative and partly in the negative. Under the facts stated by you, the appellant would become individually responsible for the costs of the appeal which accrued at his instance and not the whole costs. I call your attention to Section 7263 of the Code of Alabama of 1923. The reason I say above that the appellant is liable individually is that in your statement of facts you do not say anything about the appellant (defendant) making an appeal bond, but simply state that the appellant made a supersedeas bond. Cf. **Wooten et al. v. Hector,** 136 Ala. 230, 33 So. 821; Biennial Report of Attorney General 1936-38, page 642. Of course, if there were also given when the appeal was taken, an appeal bond, then the sureties on the appeal bond, along with the appellant, would be liable for the costs accruing at his instance on the appeal, and no more, but certainly not the sureties on the supersedeas bond, as this bond had performed its function when the appellant prosecuted his appeal to a successful determination in the appellate court. See Biennial Report of Attorney General 1934-36, page 750.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 22, 1939.

Hon. L. W. Price,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

1. Motor Vehicles—Trailer—Semi-trailer license tag—Trailer and semi-trailer to pay a license tax of 50% of the cost of the tax of the motor vehicle by which it is drawn at the time of the purchase of the trailer or semi-trailer license tag.

2. The $1.00 issuance fee as provided by Schedule 158.13 of the 1935 Revenue Act has no application to licenses for trailers or semi-trailers.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of April 20, 1939, in which you request my opinion as follows:

"There have been numerous opinions as to the proper price for Probate Judges to charge for trailer tags. Not one of these opinions has clarified the situation for me. Please give me, at your earliest convenience, an opinion as to the following:

"If a license tag for a semi-trailer to follow a 1½ ton truck, is purchased on or after April 1st, said semi-trailer having belonged to the same person who is purchasing the tag since September 30th, last year, but has not been used, how much should the purchaser pay the Probate Judge for same?

"I would refer you to Schedule 158.11 and 158.13, pages 324 and 326, Simon's Code. Should the purchaser be charged $5.63, which is half of a half-year 1½ ton truck tag, or should he be charged $5.63 plus .50 which is half of a half-year truck tag plus one-half of $1.00 additional, or should he be charged $5.63, which is a half year truck tag plus $1.00? In other words, does the half-year truck tag carry the extra dollar the same as a motor truck.

"If the semi-trailer was brought into the state on or after April 1st, please explain in detail, just how much I would have to get for it. Please do likewise where the owner owned same since September 30th, last year, but has not used same and please explain fully the price he must pay if the trailer is purchased new March 1st, but not used and no tag purchased until April 1st."

I call your attention to the fact that Schedule 158.11 of Section 348 of the Revenue Act of 1935 was amended in the 1939 Legislature by Act No. 406 (H. 904), so as to read as follows:

"158.11. Every small trailer and semi-trailer subject to a license shall pay a license tax of fifty per cent (50%) of the cost of the license tax of the motor vehicle by which it is drawn. The same to be computed on what the license of the said motor vehicle would cost at the time of the purchase of the required trailer tag. The purchaser shall specify the truck to which the trailer or semi-trailer is to be attached. Each semi-

trailer tag shall bear the same tag classification corresponding to capacity to the truck tag of the truck to which it is to be attached. Trailers of any kind or description for hauling passengers for hire are prohibited by law. Small trailers attached to passenger cars, which are used for transporting of less than 1500 pounds are exempt from payment of any license. Provided that small trailers supported by its own wheels and carrying not more than 2,000 pounds may be used by farmers in transporting their produce to and from market, but for all other purposes they are prohibited, except as permission is given in other provisions of this Act. All trailers of any kind and description used by persons exclusively for the handling of farm products raised by said farmers are exempted from the paying of said license on said trailers."

The above quoted amendment to Schedule 158.11 has the effect of putting trailers and semi-trailers, for license purposes, on a basis of one half (½) of the license tax of the truck which is to draw such trailer or semi-trailer, the same to be computed on what the license tax on the truck which draws such trailer or semi-trailer would cost at the time of the purchase of the required trailer or semi-trailer tag.

I further call your attention to the fact that on February 12, 1937, the Legislature passed an amendment to Schedule 158.5 of the Revenue Act of 1935, which act had the effect of extending to truck owners the privilege of purchasing truck tags on a monthly declining basis. This Act is found on page 108 of the Acts of the Legislature of 1936-37, Extra Session.

In answer to your first inquiry, I beg to advise that in my opinion, since trucks are now on a monthly declining basis, you should charge for such trailer or semi-trailer one half (½) of the license tax required for the truck which is to draw such trailer or semi-trailer at the time of the purchase of the trailer or semi-trailer tag. For example: assume that a person applies for a trailer or semi-trailer tag in February. If at that time the tag for the truck which is to draw the semi-trailer could be purchased for $20.00, then the semi-trailer tag would cost $10.00.

In my opinion, it is immaterial when such trailer or semi-trailer was purchased or brought into this State, as under the provisions of the above quoted amendment to Schedule 158.11, the trailer or semi-trailer license is to be computed on the basis of one half (½) of the cost of the truck license at the time of the purchase of the trailer or semi-trailer license.

Since there is now no basis for a one-half (½) year license on trailers or semi-trailers, I am of the opinion that you should not charge the $1.00 issuance fee as provided by Schedule 158.13 of the Revenue Act of 1935. An application of the above rule will answer the other questions contained in your request.

The opinion rendered to Hon. J. A. Carnley, Judge of Probate of Coffee County, page 574, Biennial Report of Attorney General, 1936-38, is hereby overruled and withdrawn.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 22, 1939

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Witnesses—Highway Patrol—

Highway Patrolmen held governed by H. B. 96, approved Feburary 17, 1939, when serving as State witnesses and allowed to prove attendance in only one criminal case on the same day.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 9, 1939, in which you request my opinion as follows:

"Please refer to House Bill No. 96 by Mr. Hodo, approved February 17, 1939, and advise me in answer to the following:

"1. Does this Act prohibit a State Highway Patrol Officer from proving and claiming his attendance in more than one case on the same day, and does it prohibit the proper authority from collecting more than one witness fee account of said officer on the same day?

"In connection with this matter, I wish to point out that the Act creating the Highway Patrol, found on Page 756, General Acts of 1935, sets forth in Section 11 that no State Highway Patrol Officer shall be entitled to any costs for attending any court, and further provides that the court clerks, or other proper authorities, shall collect such fees and mileage due such officers and remit them direct to the State Highway Patrol Fund. These provisions of the Highway Patrol law appear to consider the officers' fees and mileage as State revenue, allowing none of it to go to the officers personally."

In reply, I wish to advise that the pertinent part of House Bill 96 by Mr. Hodo, approved February 17, 1939, provides as follows:

"That Section 3770 of the Code of Alabama of 1923 be and the same is hereby amended to read as follows: 3770. FEES OF STATE WITNESSES WHEN SUBPOENAED IN MORE CASES THAN ONE: A witness for the state attending in more criminal cases than one on the same day, shall only be entitled to fees in one case, to be selected by him while so attending."

You refer to the General Acts of 1935, page 756, Section 11, which provides in part as follows:

"* * * provided, however, that no State Highway Patrol officer shall be entitled to any costs for attending any courts, but instead, the proper authorities shall collect such fees and mileage that are due such officers for attendance on any court or for any official act and to promptly turn

same into the Highway Patrol Fund, and it shall become a part thereof, such fees and mileage to be expended as other moneys in said fund are authorized to be expended. * * *"

I wish to further refer you to House Bill 245 by Mr. Hill, approved March 18, 1939, and effective September 30, 1939, which provides in pertinent part as follows:

"Section 18. That the Act entitled 'An Act to provide for the public Safety; to regulate the operation of motor vehicles on the public highways; to provide for the registration and licensing of drivers or operators of motor vehicles and to fix the fees therefor. To authorize the State Highway Commission, with the approval of the Governor, to establish and promulgate reasonable rules and regulations concerning the operation of motor vehicles; to provide punishment and penalties for the violation of the provisions of this Act and of the rules and regulations authorized hereby; to provide for the suspension and revocation of drivers' licenses issued; to authorize the appointment or employment of the necessary officers and agents, and the purchase of the necessary equipment to make the provisions hereof effective; and to provide for the compensation of the officers and agents so employed,' approved September 2, 1935, and all laws and parts of laws in conflict herewith be and the same are hereby repealed:"

You will observe that the 1935 Act referred to by you is repealed as of September 30, 1939, by the above named Act of 1939; however, a provision pertinent to your question is found in the above named 1939 Act, as follows:

"* * * provided, however, that no State Highway Patrol Officer shall be entitled to any costs, fees or mileage for attending any courts, but instead, the proper authorities shall collect such costs, fees and mileage that are due such officers for attendance on any court or for any official act and promptly turn the same over to the Director of Public Safety who shall cover the same into the Highway Patrol Fund, and it shall become a part thereof, such costs, fees and mileage to be expended as other moneys in said fund are authorized to be expended. * * *"

In my judgment, the provisions of law found in the 1939 Act by Mr. Hodo, quoted above, force the conclusion that a Highway Patrol Officer, who attends, as a State witness, in more criminal cases than one on the same day is not excepted from the provisions of the above named statute and must necessarily be controlled by this law as are other State's witnesses.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 23, 1939.

Hon. H. G. Caudle,
Executive Assistant,
Jefferson County Board of Education,
Birmingham, Alabama.

County or City Board of Education may pay any unfunded or floating debts outstanding October 1, 1939, at any time prior to

October 1, 1945, in accordance with Section 11 of Act No. 454 of the 1939 General Acts.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

I have your request for official opinion under date of July 20, 1939, which is as follows:

"I shall appreciate your rendering us an opinion in answer to the following question:

"1. A contract bus operator has claimed we owe him additional compensation for services rendered under his contract for the fiscal year 1933-34, a year in which the books and accounts of the Jefferson County Board of Education was audited by state examiners. Can this claim be legally paid by the Jefferson County Board of Education from current school funds?"

It is my opinion that the claim mentioned in your letter may be paid under authority of Section 11 of Act No. 454 of the 1939 General Acts, approved September 21, 1939. Section 11 is as follows:

"Section 11. UNFUNDED DEBTS.—If any county or city board of education has outstanding on October 1, 1939, any unfunded or floating debts, an itemized statement of the same shall be filed by said board with the State Superintendent of Education not later than December 1, 1939. Upon the approval of the State Superintendent of Education said board shall have the authority to pay said floating debts from any balance on hand at the close of any fiscal year provided that this authority shall expire on October 1, 1945."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 23, 1939.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture & Industries,
Montgomery, Alabama.

Where the Commissioner of Agriculture and Industries follows Section 31 of the Agricultural Code of 1927 and employs attorney for the purposes set out in said section, the employment would be legal and just compensation should be paid therefor.

Opinion by Assitant Attorney General Haynes.

Dear Sir:

We have your request for official opinion under date of August 16, 1939, which is as follows.

"We are enclosing a letter to Mr. Clifton Kirkpatrick, Chief of Markets, of the Department of Agriculture and Industries of a former administration, together with a bill from the firm of 'Rounds, Dillingham, Meade and Neagle, of San Juan, Puerto Rico.' The account is for professional services rendered the Department of Agriculture.

"Please advise if the claim is legal."

It is my opinion that the answer to your question, which is, "Is the claim legal?", depends upon whether or not your office followed the provisions of Section 31 of the Agricultural Code of 1927, which section is as follows:

"31. Attorney General Legal Advisor: Commissioner May Employ Attorneys.—The Attorney General shall be the legal advisor of the Department of Agriculture and Industries in matters relating to the powers and duties of the Commissioners and State Board of Agriculture. The Commissioner, with the approval of the Board and the Attorney General, may employ an attorney in any proceeding relating to the laws, powers, and duties of the Department of Agriculture and Industries, and compensate such attorney out of the appropriation to the Agricultural Department Fund. It shall be the duty of the Solicitor, when requested by the Commissioner, to investigate, institute and prosecute all violations of the Laws of the Department and rules and regulations of the State Board of Agriculture, and he shall, upon the request of the Commissioner, institute and prosecute all necessary actions and proceedings which the Commissioner is authorized to bring to execute the laws of the Department and the rules and regulations of the State Board of Agriculture."

I do not find where the above section has been amended, therefore, I am presuming it correct as it now appears in the Agricultural Code. You will note that this Section says, among other things,

"The Commissioner, with the approval of the Board and the Attorney General, may employ an attorney in any proceeding relating to the laws, powers and duties of the Department of Agriculture and Industries, and compensate such attorney out of the appropriation to the Agricultural Department Fund."

If the former Commissioner followed the provisions of the above quoted section, I see no reason why this employment is not legal. As to whether or not the statute was followed, this is a matter you will have to decide since this office has no way of knowing; all the records of this transaction are on file or should be in your office. So, if the employment was in accordance with the above quoted section and the service was performed under contract, I see no reason why this claim is not legal. See Biennial Report of Attorney General 1932-34, page 180.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

September 25, 1939.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Elections—Absentee ballots—

Judge of Probate not entitled to any compensation for delivering to the election officials of each polling place a list showing the names and addresses of each and every person whose name appears on the official voters list in such voting place or precinct who voted an absentee ballot.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of August 7, 1939, in which you request my opinion as follows:

"Hon. R. E. Woodruff, Judge of Probate of Lowndes County, included in his expense account of the special election held July 11, 1939, which expenses are to be paid by the State, an amount to cover $2.00 per diem, and 5c per mile, for furnishing to each polling place a certificate showing the names of those who voted absentee ballots.

"Please let me have your opinion as to the legality of this payment. In other words, is this an expense which the State should rightfully pay to Lowndes County?"

In my opinion, there is no authority of law for the payment of any compensation to the Judge of Probate for delivering to the election officials of each polling place a list showing the names and addresses of each and every person whose name appears on the voting list in such voting place or precinct who voted an absentee ballot.

The Judge of Probate is required to examine this list pursuant to the following provisions of Section 6 of Act No. 178 (General Acts 1933, p. 193) approved April 19, 1933:

"Section 6. * * * The said judge of probate, chairman of the executive committee of a political party holding a primary, mayor or other chief executive officer (except in cities and towns of less than 10,000 residents) shall, on the date of the election, deliver to the election officials of each polling place of the county or city, a list showing the names and addresses of each and every person whose name appears on the official voters list in such voting place or precinct who vote an absentee ballot."

I am not aware of any provision of our statutes providing any compensation for the Judge of Probate for the performance of this duty. The principle is too well known to require citation of authority that an officer claiming a fee or compensation for services rendered must point to specific statutory authority therefor, and that in the absence of such statutory authority he performs the services "cum onere".

It has been suggested that Act No. 178, supra, is a pro tanto amendment of Article 4 of Chapter 19 of the Code of Alabama, 1923, which contained our statutory law in regard to absentee ballots prior to the passage of said act, and that the Judge of Probate should be compensated for the performance of the duties required of him by Section 6 of said act, supra, pursuant to the provisions of Section 412, which is a part of said article, and reads as follows:

"412. Expenses, how paid.—The expense of carrying out the provisions of this Article shall be paid in the same manner as provided by

law for the payment of the expense of general, special or municipal elections, as the case may be."

I am of the opinion that said act is a pro tanto amendment of this article, but Section 412 thereof does not provide for the payment of any fee or compensation to the Judge of Probate for the performance of this service. It merely states the manner in which the expenses, which are incurred in carrying out the provisions of the article, shall be paid.

Since, as pointed out hereinabove, there is no statutory provision authorizing the payment of any fee or compensation to the Judge of Probate for the performance of the duties required of him under Section 6, supra, it could not be said that this is an expense of carrying out the provisions of this article.

The premises considered, I am constrained to hold that the claim outlined in your letter of inquiry is not a valid claim and cannot be legally paid.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 25, 1939.

Hon. Saxon P. Poyner,
Judge of Probate,
Houston County,
Dothan, Alabama.

Claim against the Fine and Forfeiture Fund is non-negotiable and assignee stands in shoes of the former holder.

County Depository assumes all risks of paying a claim against the Fine and Forfeiture Fund when notified by the State that original holder of the claim is indebted to the fund.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 8, 1939, in which you request my opinion as follows:

"The Dothan Bank & Trust Company of Dothan, Alabama, is depository for Houston County and as such is custodian of the Fine and Forfeiture Fund of the County.

"A number of years ago Mr. C. J. Rollins was sheriff of Houston County and as such he had claims against the Fine and Forfeiture Fund for sheriff's services aggregating $210.00. These claims have been transferred to and are now owned by Blumberg & Sons, Dothan, Alabama, who have made demand upon the Dothan Bank & Trust Company for payment thereof.

"The County depository has the funds on hand with which to pay these claims but has declined to pay same because it has heretofore been

advised by Hon. Chas. W. Lee, then State Comptroller, that the state auditors have checked the sheriff's records of C. J. Rollins and ascertained that he was indebted to the Fine and Forfeiture Fund in the sum of $4800.00, which has not been paid. State Comptroller Lee advised the Dothan Bank & Trust Company to hold and refuse to pay any funds due to C. J. Rollins and to apply such funds upon said debt. This the County depository has done.

"Mr. Rollins was under a sheriff's bond payable to the State of Alabama. It is my information that there has been no collection on said bond by the State. I would appreciate your opinion as to the following:

"1. Can the County depository pay the claim of Blumberg and Sons for $210.00 without incurring liability, or having it charged back to it?

"2. Has any action ever been instituted by the Attorney General in an effort to collect the losses on Mr. C. J. Rollins from his surety?

"3. If no action has been taken in this matter, would it not be in order for the Attorney General to seek to collect the bond by appropriate action?

"Collection of the losses guaranteed by the bond would enable the County depository to pay many outstanding claims against the Fine and Forfeiture Fund which now can not be paid on account of lack of funds and success in such efforts would mean much to the County depository and to holders of claims against said fund.

"I would be glad to be furnished with a copy of the auditor's report showing the exact facts with reference to the shortage of Mr. Rollins together with a full report as to what has been done concerning same."

In answering your inquiry, I wish to call your attention to the fact that the State of Alabama and Houston County are claiming any fine and forfeiture funds in the possession of Dothan Bank and Trust Company of Dothan, Alabama, claimed by Mr. C. J. Rollins, as a partial offset of the indebtedness of Mr. C. J. Rollins to the Fine and Forfeiture Fund of Houston County, Alabama.

The Supreme Court of Alabama has held in the case of **Littlejohn v. Littlejohn,** 195 Ala. 614, 71 So. 448, as follows:

"A county warrant is the command of one duly authorized officer to another to pay from county funds a specific fund to a designated person, whose claim therefor has been allowed by the Court of County Commissioners. **A county warrant has not the attributes of commercial paper and is not assignable. No action can be brought thereon by the transferee."** (Emphasis supplied)

In the case of **Savage, Judge, et als. v. Mathews,** 98 Ala. 535, 13 So. 328, the Supreme Court uses the following language:

"So far as being intended as a circulating paper, a county warrant, to which the rights of third persons might attach in commercial dealing, it possesses no element of a contract. **It is not assignable so as to be made foundation of an action at the suit of the transferee. Indeed strictly speaking no action can be maintained upon such a warrant against the county or any officer or person."** (Emphasis supplied).

Again in the case of **Kimmons v. Jefferson County,** 204 Ala. 384, 85 So. 774, Justice Gardner commenting on warrants issued by a county board of education under authority of the School Code and holding these warrants non-negotiable, says:

> "These instruments are not and do not purport to be county warrants, but only warrants drawn by the Board of Education directing payment out of a special fund and are not governed by any particular rule which may relate to the issuance of warrants."

The county has title to the Fine and Forfeiture Fund. **Jackson County v. Derrick,** 117 Ala. 328, 23 So. 193. Certificate of indebtedness and warrants are non-negotiable in Alabama. **Troy National Bank v. Russell County,** 291 Fed. 185.

A county warrant is not negotiable **and an assignee stands in the shoes of the original holder. Allen v. McCreary,** 101 Ala. 514, 14 So. 320.

An examination of the authorities clearly indicates that a claim against the Fine and Forfeiture Fund is non-negotiable and the assignee of any such claim takes it subject to any liabilities of the party to whom it is issued. It follows that where the Sheriff is indebted to the Fine and Forfeiture Fund that he cannot transfer his claims against said fund to a third party and that party then have the claim paid.

The County Depository having been put on notice by the State of the indebtedness of C. J. Rollins to the Fine and Forfeiture Fund, it is my opinion that the County Depository would assume the entire responsibility for the payment of the claim to the assignee of C. J. Rollins.

You may be assured that this office is preparing the necessary proceedings against the surety company for the collection of the amounts due to the county and State.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 25, 1939.

Hon. George E. Stone,
County Treasurer, Mobile County,
Mobile, Alabama.

Counties—Examination of records of county officers—

When an examination of the records of a county officer for a particular period is completed by the Division of Departmental and County Audits (now a Division of the Department of Finance), and the county has paid the expense, or its pro rata share of the expense, of the same, as the case may be, no subsequent examination of the records of such officer for the same period may be made at the expense of the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of September 18, 1939, in which you request my opinion as follows:

> "Please advise me in the following matter:
>
> "Assistant State Examiner, E. A. Henry, made an examination and audit of this office covering the years 1922 and 1936. His report showed that the books and accounts of the Treasurer were examined; and his charges have been settled. He was aided in the work by Assistant Examiner, Geo. W. Wilson, and later by other assistants. The Examiner's charges for the examination for this period have been paid. During the course of the examination, the cancelled bonds and coupons covering this period were duly delivered to the examiners as part of the records, and Mr. Wilson undertook to check them; and on numerous occasions I observed him counting them and making entries on his work sheets. As to what disposition of his work sheets or report he made regarding them, I do not know; but his fees for services covering this period were paid by the County.
>
> "Recently, other Examiners have been assigned here, and in the course of their examination, and under instructions from the Chief Examiner of Accounts, they have again counted and checked the same coupons covering the years 1922-1936, and have filed claims for services rendered in this work, along with other work.
>
> "There is no criticism of the Chief Examiner nor of the Examiners who are now at work; and the only question is:
>
> "Can the County pay a second time for an examination of the same part of its records, under the present law regarding the examinations of public accounts? (Acts 1935 page 601 Section 1)."

The functions, powers and duties of the Division of Departmental and County Audits, formerly under the State Comptroller, were transferred to the Department of Finance under the act creating that department, which is Act No. 112, (General Acts, 1939) approved March 7, 1939.

Section 1 of Act No. 218 (General Acts, 1935, p. 601) approved July 17, 1935, which is the act referred to in your letter of inquiry, reads as follows:

> "Section 1. The Division of Departmental and County Audits is hereby required to examine the records of each county officer in every county in this state at least once every two years and when said examination shall have been completed no subsequent examination for the period covered shall be made at the expense of the county."

The language of that section is too plain and clear to admit of any argument. Under its provisions, I advise you that when an examination of the records of a county officer for a particular period has been completed by the Division of Departmental and County Audits (now a Division of the Department of Finance), and the county has paid the expense, or its pro rata share of the expense, of the same, as the case may be, no subsequent exam-

ination of the records of such officer for the same period may be made at the expense of the county.

As to whether or not the situation related in your letter of inquiry constitutes a second examination of the records of your office for the period covered by a prior examination which has been completed, the expense of which has already been paid for by the county, I express no opinion, as this presents a question of fact upon which I cannot pass.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 26, 1939.

Hon. Chris J. Sherlock,
Director, State Highway Department,
Montgomery, Alabama.

Highway Department authorized to contribute money to county to assist in purchase, maintenance and operation of ferry on a State highway on which highway there is no bridge across the river on which the ferry operates.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of September 18, 1939, in which you request my opinion as follows:

"Re: Highway Dept. assisting County in purchase maintenance of a ferry on a State Highway.

"Please advise if this Department has the right to contribute money to a County to assist in the purchase of a ferry on a State Highway on which highway there is no bridge across the river on which the ferry operates. Further, if this Department has the right to make monthly contributions to the county to assist in the expense of the maintenance and operation of the said ferry.

"Your prompt reply to the above will facilitate the handling of arrangements relative to the above situation."

In my opinion, your inquiries should be answered in the affirmative.

At the outset it may be stated that under Act No. 13, S. 23, approved February 3, 1939, which created the State Highway Department and designated the chief executive as State Highway Director, all authority, powers and duties of the former State Highway Commission or Department were transferred thereto.

It is beyond doubt that the State of Alabama, through its Highway Department, has authority to contribute from the State Highway Fund moneys to the several counties to aid in the construction or maintenance of State highways or bridges (Michie's Code of Alabama, 1928, Sections 1397(20), 1397(25) and 1397(29)).

By virtue of Section 6443 the several counties have the right to purchase, establish and maintain, when necessary or requisite, ferries, and the courts of county commissioners or boards of revenue of such counties have the same powers and perform the same duties when purchasing, establishing and maintaining such ferries as they have or perform with reference to the public roads.

Regard must also be had to the fact that a "ferry" has, on numerous occasions, been held to be a continuation of the highway and a part thereof. In **Hackett v. Wilson,** 6 Pac. 652 (Ore.) it was held that "a ferry is simply a movable portion of a highway where it crosses a stream." In **Warner v. Ford Lumber Co.,** 93 S. W. 650 (Ky.) it was stated:

> "A ferry *** has been aptly called a public highway across a stream of water by boat instead of by bridge."

See also **State ex rel. Washington Nav. Co. v. Pierce Co.,** 61 Pac. (2d) 407 (Wash.) and 25 C. J. 1048, Section 1.

In view of the fact, therefore, that authority is granted to the State Highway Department to contribute money to the counties for the purpose of constructing, maintaining and operating State highways and in view of the further fact that a ferry is a part of the highway, it is my opinion that the legislative grant of authority to the State Highway Department, to contribute to the counties to aid in construction, maintenance and operation of State highways carries with it authority to assist in the purchase of a ferry, a part of the State Highway, and to contribute funds to assist in the expense of the maintenance and operation of such ferry. Cf. **Reid v. Lincoln Co.,** 125 Pac. 429 (Mont.).

Of course, the procedure to be followed in the allocation or the contribution of funds to the county for the purchase of a ferry and for its maintenance and operation must be the same as would be the case in the event such funds were contributed for the construction, maintenance, etc., of the ordinary State trunk road, highway or bridge.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 26, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Department of Finance,
Capitol.

Limestone County — Court of County Commissioners.

1. Under provisions of Act No. 362, page 167, Local Acts 1931, as amended, Court of County Commissioners of Limestone County may not purchase records, books and office supplies including civil and criminal dockets for use in the Municipal Court of Limestone County.

2. Under the provisions of said Act, the necessary office supplies including civil and criminal dockets for use in the Municipal Court of said county may be purchased and paid for out of the Municipal Court Fund set up in said Act.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your request for official opinion under date of September 7, 1939, which follows:

"I wish to refer you to Local Acts of the Legislature of 1931, page 167, and to an amendment thereof, Local Acts of 1932, page 27, and request that I be advised in answer to the following:

"1. Has the Board of Revenue of Limestone County the authority to purchase the necessary records, books, and office supplies for the Municipal Court of Limestone County?

"2. If your answer to the above is in the negative, would the Judge of the Inferior Court of Limestone County have the authority to purchase the necessary office supplies, including a civil and criminal docket, out of the Municipal Court Fund created by the Act?

"Under the Act creating this Court it is provided that it shall have and exercise all of the judiciary power and authority and shall perform all the duties required by the general laws of the State on Justices of the Peace and Justice Courts. Under Section 8793 of the 1923 Code, the law provides that the General Funds of the counties must supply Justices of the Peace with the necessary blanks and/or forms. One of the forms that would be covered by Section 8793 is a criminal docket, as set out in Section 3860 of the 1923 Code.

"Inasmuch as the Limestone Act requires that criminal and civil dockets shall be kept, and inasmuch as it is necessary for the Court to use other forms and supplies, it seems to me that there must be an implication in the law that these things be furnished the Judge of the Court without expense to him."

My answer to your first inquiry is in the negative. I know of no authority of law authorizing boards of revenue or other like governing bodies to furnish supplies for inferior courts. Quarterly Report of Attorney General, Vol. VI, page 81; Biennial Report of Attorney General 1922-24, page 244; Biennial Report of Attorney General 1928-30, page 1013.

My answer to your second inquiry is in the affirmative.

I call your attention to Act No. 362, page 167, Local Acts 1931, which Act creates the Municipal Court of Limestone County. Section 11 of said Act reads as follows:

> "Section 11. — All fines, forfeitures, and costs and fees accruing in said court shall be collected by the judge thereof, and all fines and forfeitures, and costs and fees for services performed by the judge thereof, shall be paid into the County Treasury quarterly, and must be kept in a separate fund known as the 'Municipal Court Fund,' and must be kept separate and apart from the other funds of the county."

The above section creates "The Municipal Court Fund" which fund is made up from all fines and forfeitures and fees accruing in said court.

It is provided in Section 12 of said Act that the salaries of the Judge and the Solicitor of said court shall be paid out of the Municipal Court Fund, but no provision is made for the purchase and payment of other necessary supplies of the Court. Since the act under consideration provides that the salaries of the Judge and Solicitor of said court be paid out of the Municipal Court Fund, there is a necessary implication that the other supplies necessary for the proper functioning of said court be also paid out of such fund. Where a statute or act contains a necessary implication that something be done, such necessary implication serves every purpose of a direct command. **Swindle, County Treasurer, v. Crocker,** 217 Ala. 199, 115 So. 252.

Since the supplies mentioned in your request are absolutely necessary for the proper functioning of said court, I am of the opinion that such supplies may be purchased and paid for out of the Municipal Court Fund.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 27, 1939.

Hon. William A. Conrad,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Elections — Circuit Clerks —

Candidates for nomination for office of Clerk of the Circuit Court in Democratic Primaries must file declaration of candidacy with, and pay assessment fixed to, the Chairman of the Democratic Executive Committee of his county on or before March 1st next preceding the holding of the primary election in which he is to be a candidate for nomination to said office, and must also file with the Judge of Probate of his county, within five days after announcement of candidacy, the names of the person or persons constituting his committee to receive, expend, audit and disburse all moneys contributed, donated, subscribed or in any way furnished or raised for the purpose of aiding or promoting his nomination.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of August 31, 1939, requesting my opinion as follows:

"On October 10th, 1938, the Circuit Court Judges of Mobile County appointed me Clerk of the Circuit Court of Mobile County to fill the unexpired term of the late Clerk, S. H. Smith. I served under Mr. Smith for 35 years as deputy clerk.

"I expect to be a candidate for said position in the May, 1940, Democratic Primaries, but am in doubt as to the necessary steps I should take to qualify. I will greatly appreciate your opinion on the following questions that are bothering me:—

"1. In addition to filing my intentions with the Judge of Probate of Mobile County, is it also necessary for me to file one with the Secretary of the State of Alabama and also one with the State Democratic Committee?

"2. When the entrance fee is fixed should I pay it to the Mobile Democratic Executive Committee or to the State Democratic Executive Committee?

"3. Are there any other steps which I am required to take so as to be sure to have my name placed on the ballot?"

Primary elections in this State are governed by Act No. 56 (General Acts 1931, p. 73), approved February 25, 1931, and generally known as the 1931 Primary Law, which said act has been amended only slightly and in respects not here material.

Section 60 of said act designates the office of Clerk of the Circuit Court as a county office.

Sections 11 and 12 thereof read, respectively, as follows:

"Section 11. That all persons who are qualified electors under the general laws of the State of Alabama, and who are also members of a political party entitled to participate in such primary election, shall be entitled to vote therein and shall receive the official primary ballot of that political party, and no other; but every State Executive Committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein, or to otherwise participate in such political parties and primaries; and the qualifications of electors entitled to vote in such primary election shall not necessarily be the same as the qualifications for electors entited to become candidates therein; provided, that nothing herein contained shall be so construed as to prohibit any State Executive Committee of a party from fixing assessment or such other qualifications, as it may deem necessary, for persons desiring to become candidates for nomination to offices at a primary election, but such assessments shall not exceed two per cent of one year's emolument from all sources, of the office sought, and for an unremunerative or party office it shall not exceed Five Dollars, or Twenty Five Dollars for an unremunerative or party office to be

filled by the vote of a subdivision greater than one county, or One Hundred Dollars for an unremunerative or party office filled by the vote of the whole State.

"Section 12. That any person desiring to submit his name to the voters in a primary election shall, not later than March 1st, next preceding the holding of such primary election, file his declaration of candidacy in the form prescribed by the governing body of the party with the Chairman of the County Executive Committee if he be a candidate for a County office, and with the Chairman of the State Executive Committee, if he be a candidate for any office except a County office, and in like manner, and before March 1st, next preceding the holding of such primary election, pay any assessments that may be required to be paid by him."

You can see from a reading of these two sections that you must file your declaration of candidacy with, and pay the assessment fixed to, the Chairman of the Democratic Executive Committee of your county on or before March 1st next preceding the holding of the primary election in which you are to be a candidate.

Your attention is further directed to Article 26 of Chapter 19, Sections 582-600 of the Code of Alabama, 1923, and particularly to Sections 588 and 589 thereof, which read respectively as follows:

"Section 588. Committee to receive, expend, audit and disburse money or funds contributed. — Any candidate shall, within five days after the announcement of his candidacy for any office, if the office be a state office, file with the secretary of state, and if the office be a county office, file with the judge of probate of said county, and if it be a district or circuit office, file with the judge of probate of each county which is embraced in said district or circuit, the name of not less than two nor more than five persons elected to receive, expend, audit and disburse all moneys contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting the nomination or election of such candidate, together with a written acceptance or consent of such person to act as such committee, but any candidate may, if he sees fit to do so, declare himself as the person chosen for such purpose. Such committees shall appoint one of their number to act as treasurer, who shall receive and disburse all moneys received by said committee; he shall keep detailed account of receipts, payments and liabilities. The said committee or its treasurer shall have the exclusive custody of all moneys contributed, donated, subscribed, or in any wise furnished for or on behalf of the candidate represented by said committee, and shall disburse the same on proper vouchers. If any vacancies be created by death or resignation or any other cause on said committees, said candidates may fill such vacancies, or the remaining members shall discharge and complete the duties required of said committee as if such a vacancy had not been created. No candidate for nomination or election shall expend any money directly or indirectly in aid of his nomination or election except by contributing to the committee designated by him as aforesaid.

"Section 589. Candidate acting as own committee. — Any person who shall act as his own committee shall be governed by the provisions of this article relating to committees designated by candidates. Failure to make the declaration of appointment or selection by any candidate

as herein required is declared to be corrupt practice, and in addition the name of such candidate so failing shall not be allowed to go upon the ballot at such election."

It will be noted from a reading of these two sections that a person desiring to become a candidate for a county office must file with the Judge of Probate of his county, within five days after the announcement of his candidacy, the names of not less than one nor more than five persons, or himself, as his own committee, to receive, expend, audit and disburse all moneys contributed, donated, subscribed or in any way furnished or raised for the purpose of aiding or promoting his nomination.

If you comply with the above quoted statutory provisions, and then file the statement of your campaign expenditures within the time and in the manner prescribed in Article 26 of Chapter 19, supra, you will have taken, in my opinion, all steps necessary to insure that your name be placed on the ballot as a candidate for nomination to the office of Clerk of Circuit Court of your county.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 27, 1939.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Fees —

1. Clerk of the Circuit Court of Clarke County entitled to five per cent commission on witness fees collected by him paid into the County Treasury.

2. Claim of the Circuit Court of Clarke County for five per cent commission on witness fees collected by him and paid into the County Treasury not barred by the limitations imposed by Section 228 of the 1923 Code.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your request for official opinion, under date of March 18, 1939, which is as follows:

"I am enclosing herewith copy of a letter I have just received from Hon. J. Henry Megginson, Circuit Clerk. Also attached to the letter is a bill against Clarke County for $128.77 for five per cent on witness fees paid by said Circuit Clerk into the County Treasury from February 5, 1935, to June 15, 1938, both inclusive. Until Honorable A. A. Carmichael,

Attorney General, rendered an opinion on June 14, 1938, construing subsection 16 of Section 6724 of the Code of Alabama of 1923 the Clerk had not retained the five per cent of witness fees paid into the County Treasury. The question before me is this:

"Is the Circuit Clerk entitled to the five per cent fees he failed to deduct when he paid monies into the County Treasury from February 5, 1935 to June 15, 1938? A list of the payments is also hereto attached.

"A prompt reply will be appreciated as we want your opinion in deciding whether or not the county is liable."

An opinion was rendered to you answering the above on March 31, 1939, and appears in Quarterly Report of the Attorney General, Vol. XIV, page 331. Although the conclusions reached in said opinion are correct, there are some statements contained therein that might be misleading. Therefore, it is deemed advisable to re-write said opinion as follows:

From the statement of facts contained in your letter and the bill of the Circuit Clerk attached, it appears that the Clerk paid into the County Treasury the sum of $2575.48 as witness fees, which he had collected, and failed to deduct his commission of five per cent. The Clerk evidently acted under authority of the provisions of Act No. 46, Local Acts of 1907, page 57, approved February 15, 1907. Sections 1, 3, 4 and 5 of said Act provide that the County Commissioners shall appropriate and set apart from the General Fund, for the payment of certificates of State witnesses issued by the Grand Jury and by the Clerk of the Circuit Court of said County, not less than $1600.00 nor more than $2500.00 each year, and that the County Treasurer shall pay said certificates upon presentation. The Act further provides that the Clerk of the Circuit Court shall pay all costs, including witness fees collected by him, into the County Treasury as a supplemental fund to that provided for by the Commissioner's Court. Said Sections read as follows:

"Section 1. Be it enacted by the Legislature of Alabama, that it shall be the duty of the court of county commissioners of Clarke County, Alabama, to set apart and appropriate from the general funds of said county an amount not less eight hundred dollars and not to exceed twelve hundred and fifty dollars at each of the regular terms of said court held in January and August of each year with which to pay and discharge certificates of State witnesses issued by the foreman of the grand jury and by the clerk of the circuit court of said county."

"Section 3. That it shall be the duty of the county treasurer of said county on presentation of these or any of the certificates provided for in the above section (section two of this act) to pay the same without further endorsement from the sum set apart as above provided for and to cancel the same, keeping a record of the amount of the same, which certificates after being so paid, shall be vouchers for the said treasurer in his settlement, provided that said certificates shall be presented for payment within six months after the issuance of the same, or on failure shall be forever barred."

"Section 4. That in cases in which the defendant is convicted, the amount of the certificates issued as above provided for shall be charged as costs against said defendant and collected as other costs and shall be paid into the treasury of said county, and as a supplemental fund to that provided for in section one of this act."

"Section 5. That within thirty days after the adjournment of the regular term, or any special or adjourned term of the circuit court of said county, it shall be the duty of the clerk of the said court to certify to the county treasurer the amounts of certificates issued to witnesses before the grand jury and State witnesses in the circuit court. In each case where the State has secured a conviction, and where said witnesses' fees are collected, it shall be the duty of the clerk to pay the same over to the county treasurer when collected."

It, therefore, appears that in collecting costs and witness fees, your clerk is collecting money for the County and at stated intervals pays said money into the County Treasury. Such money when collected by him is not paid direct to the witnesses, therefore, it cannot be said that he is collecting money for witnesses.

Under the rulings of our office, it appears that the Clerk is entitled to five per cent commission on witness fees when the same are collected and paid into the General or a special fund under authority of a local act, on the theory that the Clerk is collecting money for the county. On the other hand, it appears that the Clerk is not entitled to five per cent commission on witness fees when he collects the same and pays the money over to the witnesses. See Biennial Reports of the Attorney General, 1928-30, page 990; Quarterly Reports of the Attorney General, Vol. XI, page 103.

You are, therefore, advised that in my opinion, your Circuit Clerk is entitled to five per cent commission on the witness fees which he paid into the County Treasury.

The question might arise as to whether this claim should have been presented to the Board within twelve months as provided for in Section 228 of the 1923 Code. It is my judgment that this claim is of the type that is not required to be itemized and presented to the Board of Revenue for audit and allowance.

In the case of **Briggs v. Coleman,** 51 Ala. 561, it was held that a witness' certificate in a criminal case was not a claim against the county that had to be itemized and presented to the Board of Revenue for audit and allowance.

Also in the case of **State ex rel Holcombe v. Stone,** 157 So. 454, 229 Ala. 357, it was held that a certificate of the trial judge of fees allowed officer attending condemnation proceeding need not be itemized, sworn to, and presented to the Board of Revenue for audit and allowance.

Also in the case of **Board of Revenue of Montgomery County v. Southern Bell Telephone & Telegraph Co.,** 76 So. 858, 200 Ala. 532, it was held that the certificate of the judge of probate for payment of franchise tax erroneously paid need not be presented to the Board of Revenue for audit and allowance.

We find in the case of **State ex rel City of Mobile v. Board of Revenue of Mobile County,** 61 So. 814, 180 Ala. 514, that there are two exceptions to the rule of law requiring claims to be itemized, sworn to, and to be presented to the Boards of Revenue within twelve months for audit and allowance. The two exceptions referred to appear in the following language of the Court:

"Where special laws in express terms or by necessary implication provide for a different mode of dealing with such claims, that mode is, of course, followed, though in derogation of the general statutes and policy of the state. And, again, where the law itself determines the fact and the amount of the claim, leaving nothing to be ascertained or determined by the county board, it is generally held that presentment for audit, and allowance or rejection is not contemplated or required."

The opinion given you under date of March 31, 1939, and reported in Quarterly Report, Vol. XIV, page 331, is hereby withdrawn and the opinion herein expressed substituted therefor.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 28, 1939.

Hon. William A. Conrad,
Clerk, Circuit Court,
Mobile, Alabama.

Attachments — Non-resident suing a non-resident in Alabama held required to give bond with surety resident in this State as in other cases.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of September 16, 1939, in which you request my opinion as follows:

"Section 6178 of the Code of Alabama of 1923 states:

" 'A non-resident of this state may sue out an attachment against a nonresident for an existing debt or ascertained liability; but the plaintiff, his agent, or attorney, is required, in addition to the oath necessary in other cases, to swear that, according to the best of his information, and belief, the defendant has not sufficient property within the state of his residence wherefrom to satisfy the debt; and **must also give bond as in other cases**, with surety resident in this state.'

"Does that portion of the above section, viz: 'and must also give bond as in other cases', imply that a non-resident plaintiff in a suit against a non-resident defendant is entitled to the same relief as a resident plaintiff?

"In other words, where a non-resident plaintiff files in the office of the Clerk of the Circuit Court, a complaint claiming of a non-resident

defendant an existing debt or ascertained liability, also an affidavit under Section 6172, paragraph 2, and Section 6173, paragraph 1, and also an affidavit under Section 6178 of the Code of Alabama of 1923; Is it the duty of the Clerk to require the said non-resident plaintiff to put up a bond in double the amount claimed by said non-resident plaintiff of the said non-resident defendant, before the issuance of the Writ of Attachment?"

In reply, I wish to advise that, in my judgment, a bond is necessary to the attachment suit contemplated by your inquiry.

You quote Section 6178 of the Code of 1923, and call particular attention to the clause, "and must also give bond as in other cases *** ".

The Supreme Court of Alabama has specifically held in the case of **Engram v. Thomas,** 101 So. 834, 212 Ala. 129, that, "failure to give bond before issuance of attachment is fatal, unless the statute specifically authorizes the defect to be cured."

In my judgment, the statute quoted by you specifically requires the giving of a bond, and a bond as required by law is essential to such suit.

The Supreme Court in the case of **Engram v. Thomas,** supra, held that when the plaintiff is a resident the only time that a bond is not required is when the attachment is sued out on the ground that the defendant is a non-resident. A bond is required in all cases where the defendant is a non-resident, if the plaintiff is likewise a non-resident.

It is, therefore, conclusive, in my judgment, that a bond, as required by law, in double the amount claimed, be made by the non-resident suing another non-resident in attachment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 28, 1939.

Hon. J. Percy Oliver,
Judge of Probate,
Tallapoosa County,
Dadeville, Alabama.

Jury Commission appointed by authority of General Acts of the Legislature 1939, approved March 2, 1939, entitled to Five Dollars per day subject to Section 5 of said Act.

Jury Commission permitted to employ clerk to be paid out of County Treasury at the rate of Five Dollars per day subject to Section 8 of said Act.

Opinion by Assistant Attorney General McCall.

Dear Sir:

I have your letter of September 18, 1939, in which you request my opinion as follows:

"The Chairman of the Jury Board of this County has filed two accounts with the Court of County Commissioners of this, Tallapoosa County, copies of each are herewith enclosed for your inspection. One of said accounts is for service of each member of the board for 20 days work, $100.00 each, and 20 days for the Clerk at $5.00 per day, $100.00. The other account is for Mrs. James Thomas, Clerk, $50.00 for 10 days work "Services Clerk, out in the County interviewing and selecting jurors additional service."

"There is no question about the services for which the claims have been filed having been actually performed, but I would like to know if these claims are legal claims against the County and whether or not it will be proper for me to issue warrants in payment of the same?"

Act No. 59 General Acts of 1939, approved March 2, 1939, created Jury Commissions in all of the counties of the State except Montgomery and Jefferson, and repealed all laws, general, local, or special in conflict therewith.

Sections 1, 3, 5, 8, 9, 11 and 12 of said Act read as follows:

"Section 1. That a Jury Commission be and the same is hereby established in every county in this State."

"Section 3. That within ninety days after the passage and approval of this Act, the Governor shall appoint the members of the several Jury Commissions who shall constitute said several commissions during the Governor's tenure of office and until their successors are appointed and qualified, and thereafter the Governor shall appoint the members of said Jury Commissions for and only during the tenure of office of the Governor making the appointment and until their successors are appointed and qualified."

"Section 5. Each member of the Jury Commission shall be paid the sum of Five Dollars ($5.00) per day for the time actually engaged in the discharge of his duties as such member, to be paid out of the County treasury upon the warrant of the probate judge of the county. Such warrants are to be issued by such probate judge upon evidence satisfactory to him that such service has been rendered; but the compensation of each member of the commission shall not exceed for any year of his term the following amounts, viz: In counties of twenty-five thousand population or less One Hundred Dollars ($100.00); in **counties exceeding twenty-five thousand and not exceeding fifty thousand population Two Hundred Dollars ($200.00)**; in counties exceeding fifty thousand and not exceeding seventy-five thousand population Three Hundred Dollars ($300.00); and in counties exceeding seventy-five thousand population Six Hundred Dollars ($600.00); the population of said respective counties to be determined by the last preceding Federal census."

"Section 8. In Counties having seventy-five thousand population or less by the last Federal census preceding the employment, the clerk of the Circuit Court may be employed as the Clerk of the Jury Commission and in such counties the Clerk of the Jury Commission whether he be the clerk of the Court or not, shall be paid for his services rendered under the direction of the Jury Commission the sum of Five Dollars ($5.00) per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having more than seventy-five thousand and less than two hundred thousand population according to the last or any subsequent Federal Census, the Commission shall employ a clerk who shall hold no other office during the term of his employment and who shall be paid for his services rendered under the direction of the Jury Commission, the sum of Five Dollars ($5.00) per day while actually engaged in performing his duties, to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having more than two hundred thousand population according to the last or any subsequent Federal census, the Jury Commission in any such county shall have authority to employ such clerical assistance as such Commission deems necessary and proper, and may expend for such clerical assistance in compensation and in paying their reasonable and necessary expense in performing the duties of their employment a sum not to exceed Four Hundred and Fifty Dollars ($450.00) per month to be paid out of the county treasury upon the order of the President of the Jury Commission. **In counties having a population of 75,000 or less, according to the last preceding Federal census, the clerk of the Jury Commission shall not receive more than $300.00 as compensation for his services in any one year.**"

"Section 9. Every clerk of a Jury Commission before entering upon the discharge of his duties under this Act, must take and subscribe the oath of office prescribed by Section 279 of the Constitution and file the same for record in probate office of the county."

"Section 11. The clerk of the Jury Commission shall, under the direction of the Jury Commission obtain the name of every male citizen of the county over twenty-one and under sixty-five years of age and their occupation, place of residence and place of business, and shall perform all such other duties required of him by law under the direction of the Jury Commission."

"Section 12. The clerk of the Jury Commission must give such time to the performance of his duties as may be required by the Jury Commission but shall not be paid for Sundays. The Jury Commission may at any time discharge any clerk employed by it and employ another."

This office has held that members of the Jury Commission are entitled to receive compensation as provided in Section 5 of said Act.

Quarterly Report of Attorney General, Vol. XV, p. 249.

Members of Jury Commissions appointed under Act No. 59 General Acts 1939, approved March 2, 1939, are required to meet as soon as practicable after the approval of the Act and empty and refill the jury boxes and that such boards are entitled to the sum of Five Dollars ($5.00) per day while performing such duties, subject to the maximum limitation as provided in the act.

Quarterly Report of Attorney General, Vol. XV, page 270.

By the provisions of Section 8, the Jury Commission is permitted to employ a clerk, to be paid at the rate of Five Dollars per day while actually engaged in performing his or her duties to be paid out of the county treasury upon the order of the President of the Jury Commission. In counties having a population of 75,000 or less according to the last Federal Census, the clerk shall not receive more than $300.00 as compensation for his or her service in any one year.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 28, 1939.

Hon. J. F. Alldridge,
Chairman Board of Finance and Control of Cullman County,
Cullman, Alabama.

Counties — Coroners —

Coroner's claim for fees must be presented to Court of County Commissioners, Board of Revenue or other like governing body of a county for audit and allowance and such claim is barred if not presented within twelve months from the time it accrues or becomes payable. However, the payment of a part of a claim filed by Coroner which was barred as not having been presented within twelve months from the time it accrued or became payable is authorized under Section 186, Code of Alabama, 1923, and the payment of that part of said claim which is barred is not chargeable back to officer issuing said warrant.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated August 30, 1939, which follows:

"On October 14, 1938, the Board of Finance & Control of Cullman County approved claim of Coroner, Grady Moss, in the amount of $42.50 and I as Chairman of the Board of Finance & Control of Cullman County issued warrant No. 20 in the amount of $42.50 covering above claim.

"On a partial audit of the Books of the Board of Finance & Control, the auditors found that $33.40 of this amount was for services performed during the twelve months just prior to October 14, 1938 and that $9.10 was for services rendered more than twelve months before claim was filed.

"The Auditors take the position that this $9.10 not having been filed within twelve months would be barred from payment and they contend that under the law, they will have to charge same back to me as the official issuing the above warrant."

In reply to your inquiry, attention is directed to Section 228, Code of Alabama, 1923, which is as follows:

"Claims barred if not presented. — All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

It will be noted that the above section provides that all claims against a county, except claims due minors or lunatics, are barred unless presented for allowance within twelve months after they accrue or become payable. The Supreme Court has held that there are only two exceptions to this general provision of law. In the case of **State ex rel. City of Mobile v. Board of R. & R. Com. of Mobile County,** 180 Ala. 514, 61 So. 814, Mr. Justice Somerville, in delivering the opinion of the Court, said:

"As declared in Miller v. Paris, 145 Ala. 494, 497, 39 So. 658, 659: 'It has been, and still is, the general financial policy of the state that all claims against a county shall be presented to the commissioners' court, or to the board of revenue exercising the powers and duties of the commissioners' court.' Where special laws in express terms or by necessary implication provide for a different mode of dealing with such claims, that mode is, of course, to be followed, though in derogation of the general statutes and policy of the state.—Dale County v. Gunter, 46 Ala. 134; Commissioners v. Rather, 48 Ala. 433. And, again, where the law itself determines the fact and the amount of the claim, leaving nothing to be ascertained or determined by the county board, it is generally held that presentment for audit, and allowance or rejection is not contemplated nor required. Caldwell v. Dunklin, 65 Ala. 461; Shinbond v. Randolph County, 56 Ala. 183."

The fees to which a Coroner is entitled for services rendered in his official capacity are definite and determined by law (Code of Alabama, 1923, Sec. 3751) and it seems that the claim of the Coroner for fees would fall within one of the exceptions pointed out in the case of **State ex rel. City of Mobile v. Board of R. & R. Com. of Mobile County,** supra, and therefore would not be subject to presentation, audit and allowance. However, the Supreme Court has passed on this question, holding that a Coroner's claim for fees must be presented for audit, allowance and registry. See **Miller, Treasurer v. State ex rel. Paris, Coroner,** 145 Ala. 494, 39 So. 658; **Hawkins v. Duncan,** 103 Ala. 398, 15 So. 828. It is, therefore, my opinion that that part of the claim presented by the Coroner, Grady Moss, which was for services rendered more than twelve months prior to the filing of the claim for the same was barred as not having been presented for allowance within twelve months after it accrued or became payable as required by Section 228, supra.

However, due to the fact that the County was benefited by the services performed by the Coroner, together with the fact that at the time the services were performed the Coroner was entitled to his fees for the rendition of such

services, it is my opinion that the Board of Finance and Control of Cullman County, Alabama, was authorized under Section 186 of the Code of Alabama, 1923, to pay the entire claim herein being considered and that the payment of that part of said claim which was barred as not having been presented within twelve months from the time it accrued or became payable is not chargeable back to you as the officer issuing said warrant. See Quarterly Report of Attorney General, Vol. XIV, pages 142, 144 and 331. Section 186, supra, is as follows:

"186. Equitable claims or demands against county; mode of payment provided.—The court of county commissioners, board of revenue, or other governing body of any county may appropriate from the general or special funds of the county, such sums of money as such governing body shall determine from time to time for the following purposes: First, To reimburse any person, firm or corporation, who in good faith has performed services, advanced money, or property for the use of the county, or who has in good faith bought county warrants issued under invalid acts of the legislature for tick eradication or for building public roads. Second, To refund to any person, firm or corporation, money, or compensate him or it for services rendered or money or property advanced and devoted to the use of the county, in procuring funds for carrying on road improvement, tick eradication, or any lawful public work, where, after the advancement of such money, or property, or the rendition of such service, it was declared by decision of the supreme court, or by the decision of the attorney-general that the county was without authority to pay such claims on account of a defect in any law or any other reason."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 28, 1939.

Hon. W. O. Brownfield,
Clerk, Circuit Court,
Lee County,
Opelika, Alabama.

Circuit Clerks—Costs and Fees—

When a civil suit is removed by change of venue from one circuit to another, the clerk of the circuit court first taking jurisdiction is entitled to his costs and fees for recording the proceedings filed with him and the circuit clerk of the circuit court last taking jurisdiction is entitled to collect his costs and fees for that part of the proceedings recorded by him as part of the final record and not previously recorded by the clerk of the court first taking jurisdiction of the case.

Trial Tax—In civil cases removed by change of venue from the circuit court of one county to the circuit court of another county, only one trial tax may be charged and is taxed upon the case going upon the docket in the circuit court first taking jurisdiction.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of June 12, 1939, in which you request my opinion as follows:

"I shall appreciate your opinion on this matter:

"Where a civil suit is transferred from the Circuit Court of one County to the Circuit Court of another County, by consent for a change of venue; where should the final record of the pleadings be made?

"And again: Where should the trial tax be charged and collected; if not in both courts, which one?"

In an addenda to your request you state as follows:

"On October 17, 1938, a suit of Myrtis Hoffman, as Executrix of the estate of Murray B. Hoffman, deceased vs. New York Life Insurance Company, was filed in the Chambers County Circuit Court, the plaintiff being a resident of that county. On February 18, 1939, before the case came to a trial, the parties plaintiff and defendant entered into a written agreement, duly signed, that the venue and jurisdiction of the cause be transferred from the Circuit Court of Chambers County to the Circuit Court of Lee County. Accordingly on March 7th, 1939, by order of Court, the transfer was made to this Court.

"The Clerk of the Circuit Court of Chambers County transferred all pleadings and papers to this court. With his bill of costs, he lists his fee for final record and also the trial tax.

"This question therefore arises:

"Shall the final or 'Complete record' be **also** made in Lee County Circuit Court, and charged for; and shall the trial tax **also** be charged and collected in this court; and if not; is this is a duplication of charges; then in which of the courts should these charges be made?"

In reply, I wish to advise that I note from your statement of facts that the change of venue in this case was perfected by agreement. I wish to call your attention to Section 10467 of the Code of Alabama of 1923, which provides as follows:

"10467. Venue of actions.—All actions on contracts, except as may be otherwise provided, must be brought in the county in which the defendant or one of the defendants resides, if such defendant has within the state a permanent residence; all other personal actions, if the defendant or one of the defendants has within the state a permanent residence, may be brought in the county of such residence, or in the county in which the act or omission complained of may have been done or may have occurred. All actions for the recovery of land, or of the possession thereof, or for a trespass thereto, must be brought in the county where the land lies; a summons issued contrary to this section must be abated

on the plea of the defendant. Any agreement or stipulation, verbal or written, whereby the venue herein prescribed is proposed to be altered or changed so that suits may be brought contrary to the provisions of this section, is void."

I wish to further refer you to Section 10476 of the Code of 1923, which provides as follows:

"10476. Venue changed once on motion of a party.—Either party to a civil suit may, at any time before final trial, move the court to change the venue, making affidavit that for causes set forth, he cannot have a fair and impartial trial in the county where the suit is pending. The court may direct a change to the nearest county free from proper objection by either party, to be determined by affidavits; and whenever it will best secure the ends of justice, may require the applicant to give bond and security for costs. The same party can have the venue changed but once."

You will note that under the provisions of the above quoted law, a change of venue by agreement is void, but if a motion be filed and a change of venue be perfected according to the provisions of the above quoted Section 10476, quite a different situation arises. Your questions, however, will be answered on the assumption that this change of venue was proper.

I wish to refer you to Section 10129 of the Code of Alabama of 1923, which provides as follows:

"10129. Papers to be recorded on filing.—The original pleading in civil suits, at law or in equity, the original process issuing thereon, all affidavits and bonds taken in the course thereof, must be recorded immediately after the filing thereof, or after the return of such process; and the costs of such record are taxable as part of the costs of the cause. If the original pleading, or process, or affidavit, or bond, should be lost, a copy of such record duly certified, shall stand in the place, and have the force and effect of the original. The original pleading, or the affidavit, or bond, must not be taken from the office of the clerk or register until after the record thereof, and such record forms part of the final record of the cause."

You will note that this section requires the recording of the pleadings upon their being filed for the evident purpose of perpetuation, the provision being that upon their being lost or misplaced, that a properly certified copy may be used for the trial procedure in the cause. This section specifically provides that the costs of such record shall be taxed as costs in the case. The statute, supra, also provides that such record become part of the final record in the case.

I wish to further refer you to Section 7258 of the Code of 1923, which provides as follows:

"7258. When fees due.—Fees allowed by law are due only at the termination of the suit, except that fees for transcripts of papers filed in the cause, other than copies of bills, to which parties are entitled as, of course, are due when service is performed; and no fee, except for final record, shall be demanded or received in any case unless the service has been performed."

In my judgment, the clerk of the circuit court first taking jurisdiction of the case is entitled to his fees for recording the original pleadings at the same rate as paid for making the final record, since the statute provides that such recordings shall become a part of the final record. In my opinion, the clerk of the circuit court first taking jurisdiction of the case is entitled to that portion of the total final record costs which would be presented by the original pleadings so recorded by him under the provisions of Section 10129, quoted supra.

I wish to further call your attention to Section 6724 of the Code of 1923, Subsection 9, which provides as follows:

> "9. To record in well-bound books, within six months after the final determination of any suit or prosecution, all the proceedings relating thereto, not previously recorded under section 10129 (5636), except the subpoenas, affidavits for continuance, commissions to take testimony, evidence and executions."

You will note from the above quoted section that the clerk of the circuit court last taking jurisdiction of the case must record those proceedings specified under Section 6724, supra, which have not previously been recorded under the provisions of Section 10129, and may be paid, therefore, his fees for making that portion of the final or complete record which he has actually made.

Premises considered, it is my opinion that the final record costs are composed of the costs for recording the original pleadings and the record of the procedure required by Section 10129, supra, which are recorded by the clerk of the circuit court first taking jurisdiction of the case; and of the proceedings recorded by the circuit clerk of the circuit court last taking jurisdiction. In my judgment, each clerk is entitled to be paid from the final record costs for that portion of the said final record actually recorded by each, as above set out.

Concerning the trial tax, it is my opinion that this tax is placed upon each case that goes upon the docket and is collected as costs are connected. However, the trial tax in the instant case attaches upon the docketing of the case in the circuit court first taking jurisdiction, and in my judgment follows the case through the circuit court taking final jurisdiction. (See opinion of the Attorney General, Quarterly Report, Vol. V, page 11). The policy and spirit of our laws is to frown upon double taxation.

See **State v. National Cast Credit Ass'n.**, 224 Ala. 629, 141 so. 541.

The tax accrues upon the case going upon the docket and is taxed upon "each case" going upon the docket of a circuit court. The instant case cannot be said to be a new case when the venue is changed. The original pleadings and records are transferred and the case pursued to its conclusion.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 29, 1939.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Excise Tax—A foreign corporation (financial institution) may deduct a certain part of its home office operating expenses, depending on the amount of business done in Alabama, in addition to the expenses of the local office or offices, as ordinary or necessary expenses incident to its operation within the State of Alabama in determining its net income.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

I have your request for official opinion dated May 26, 1939, which is as follows:

"Please advise me in answer to the following:

"Can a foreign corporation operating in Alabama in the banking or lending business legally claim exemption of Excise Tax by deducting from the Alabama Income Tax return an amount as Home Office overhead expenses in addition to deducting all operating expenses of the Alabama branches or offices?"

Foreign corporations doing business as a banking or lending corporation are subject to the payment of an excise tax for financial institutions as set out in Article XII, Chapter 1 of the Revenue Act of 1935, (General Acts 1935, pp. 256, 428). Under Section 346 (1) of the above cited act we find the following definition:

"(b) 'Net Income' shall mean and include the net income for the taxable year, as in this Act defined, arising from the business the privilege to engage in which is hereby taxed computed by deducting from the gross income arising from such business, without any exclusions from or credit to such gross income, the total amount of the following deductions:

"(1) Expenses. All the ordinary and necessary expenses paid or incurred during the year the income is received which is made the basis of the tax in carrying on the business, the privilege to engage in which is hereby taxed, including a reasonable allowance for salaries or other compensation for personal service actually rendered. Traveling expenses including a reasonable amount expended for meals and lodgings while away from home in the necessary business of such institutions; rentals or other payments required to be made as the condition to the continued use or possession for the purposes of such business, or property to which the taxpayer has not taken or is not taking title or in which the taxpayer has no equity, provided the amount and the reasonableness of all such expenditures shall be approved by the State Tax Commission."

The expenses of the home office of a corporation are inalienably a part of the costs of operating the business within the State. The Supreme Court

of Michigan, in the case of **Michigan Millers' Mutual Fire Ins. Co. v. McDonough,** 358 Ill. 575, 193 N. E. 662, uses the following language:

> "To determine the net profits of a certain agency the proportion of the company's whole and entire cost of operation should enter into the calculation."

> "Tax statutes must be liberally construed in favor of the taxpayer and to carry out the legislative intent." Corona Coal Co. v. U. S. 21 Fed. (2d) 489; affirmed (C.C.A.) U. S. v. Corona Coal Co., 23 Fed. (2d) 673.

Reasonable and practical construction should be given a statute relating to deductions in computing income tax. **Welch v. Hilburn,** 5 Fed. Sup. 581. "Business" as used in the Revenue Act providing for deduction of ordinary and necessary expenses in carrying on any trade or business, was used in its ordinary sense, which is a very comprehensive term and embraces everything about which a person can be employed for gain or profit. **Cecil v. Commissioner of Internal Revenue,** 100 Fed. (2d) 896.

Practically any reasonable expenditure which has benefited business is deductible as ordinary and necessary expenses. **A. Harris & Co. v. Lucas,** 48 Fed. (2d) 187, 188. A statute providing deductions in computing net income of a corporation subject to tax must be construed by giving to the language thereof its plain, ordinary meaning. **Comer Oil Company v. Burnett,** 67 Fed. (2d) 965. Where the proper construction is in doubt, the contemporaneous construction placed thereon by the court **and by officers whose duty it is to construe it,** should be regarded in determining the proper construction. **State v. Board of School Commissioners of Mobile County,** 183 Ala. 554, 63 So. 76. **Macon County v. Abercrombie, Judge,** 184 Ala. 283, 63 So. 985.

Administrative officials' contemporaneous construction of a statute, application or meaning of which is doubtful, is entitled to great consideration, **especially if it has prevailed for a considerable time. State et als. v. Tuscaloosa Building and Loan Association,** 230 Ala. 476, 161 So. 530.

The Department of Revenue, in the administration of the Revenue Act, has for a long period of time allowed these deductions in the same manner as deductions are allowed on income tax returns. These officials are thoroughly cognizant of the various intricacies of the income and excise tax statutes. They determine the reasonableness of such expenditures and must approve them.

The premises considered, it is my opinion that a foreign corporation (financial institution) may deduct a certain part of its home office operating expenses, depending on the amount of business done in Alabama, in addition to the expenses of the local office or offices as ordinary or necessary expenses incident to its operation within the State of Alabama, in determining its net income.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 30, 1939.

Hon. L. E. Hall,
Register, Pike County,
Troy, Alabama.

Clerks of Courts—Register of equity court is liable for all moneys coming into his hands, but is mere agent of court, and as such holds moneys for court and must disburse money as court directs and assumes no personal liability therefor, although liable for loss by his wrongful act.

Opinion by Assistant Attorney General Russell.

Dear Sir:

I have your request for official opinion dated September 1, 1939, which follows:

"In a certain cause lately pending in the Circuit Court of this County, in Equity, I as Register, sold certain lands for division among the heirs at law, who were joint owners and tenants in common of said lands. One of the heirs, is a minor and a non-resident of this State and resides in the State of Texas, and there is no legal guardian duly appointed for said minor, the amount of money to which he is entitled out of the proceeds of said sale is the sum of $59.93, and this small amount would hardly justify the costs of Court incurred by having a Guardian appointed, therefore, I will greatly appreciate it, if you will advise of your opinion as to whom I may pay this money over to so as to have a valid receipt that will clear me of liability."

In reply to your inquiry, attention is called to the case of **Shelley v. Thomas,** 232 Ala. 227, 167 So. 316, wherein the Court, speaking through Mr. Justice Knight, made the following statement:

"While the register is liable for all moneys coming into his hands, yet he is a mere agent of the court, and as such agent he holds the money for the court, and is answerable for any loss of the money by his wrongful acts, but, being an agent of the court, he must disburse the money as the court, his master, directs, and in doing so assumes no personal liability. 21 Corpus Juris, Sec. 751, p. 603; People v. Randall, 73 N. Y. 416; Johnson v. Fleming, 116 Ky. 680, 50 S. W. 855. In fact, if he should refuse to comply with the orders of the court in making distribution of the fund, he could be held for contempt, and punished accordingly. 11 Corpus Juris, Clerks of Court, p. 884."

It will be noted from the above quoted excerpt, supra, that the Register is liable for all moneys coming into his hands, but is a mere agent of the court, and as such must disburse said moneys as the court, his master, directs. If the register disburses moneys as the court directs, he is relieved of any personal liability, but a failure to make distribution in accordance with the orders of the court makes him personally liable and also guilty of contempt for which he can be punished accordingly.

A court of equity has broad powers and can order the distribution of the funds now in your hands belonging to the non-resident minor to be

paid in various ways. It is, therefore, my opinion that upon the proper order of the Circuit Court of your county, in Equity, authorizing and directing you to pay the funds in your hands over to the non-resident minor or his legal custodian, and upon your following the mandate of said order, you will be relieved of any personal liability.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

September 30, 1939.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Schools—Ordinarily funds derived from insurance on burned high school building should be used to replace said burned building. However, if the matter be treated as a sale under Section 387 of the School Code of 1927, the disposition of the proceeds is governed by Sections 388 and 389 of the School Code of 1927.

Opinion by Assistant Attorney General Screws.

Dear Sir:

We have your request for official opinion under date of July 27, 1939, which is as follows:

"A school building, erected and operated under Article XXIV of the Alabama School Code of 1924 and subsequent related Acts, was destroyed by fire a few months ago. The building was insured with the State in compliance with the law.

"Upon receipt of the funds arising from the insurance adjustment, the custodian of county school funds was instructed by the county superintendent to deposit the money in the general fund. The funds were thus deposited.

"The Board of Education plans to replace the burned building at a later date, but for the present desires to use the proceeds from the insurance for general school expenses over the entire county.

"We shall appreciate your opinion on the following points:

"1. Should the proceeds of the insurance be deposited in the general fund of the Board of Education or should they be deposited in the building fund and designated specifically for the replacement of the burned building?

"2. If the insurance proceeds are deposited in the general fund, will it be legal for the County Board of Education to disburse the money for general school expenses, leaving the matter of replacement of the building open for later consideration?"

You state that the school building in question was erected and operated under Article XXIV of the School Code of 1924 and subsequent related acts. This article was carried forward in the School Code of 1927 as Article XXIV (Sections 460-468) with minor changes. The same relates to establishing and administration of high schools.

The insurance on school buildings is provided for in Section 134 of the School Code of 1927, which is as follows:

> "134. Insurance on Schools.—The County Board of Education is charged with the duty of seeing that every school building whose title is vested in the State, County or school district is insured for its insurable value, and to this end may use a part of the proceeds of incidental fees, district tax levies, or such other funds as may be specifically set apart for such purpose by the County Board of Education."

See also General Acts 1936-37, p. 260.

However, there is no provision of law governing the disposition of the proceeds derived from insurance received in case of a burned school building. The purpose of the insurance is to enable the replacement of a building in case it is burned. Ordinarily, therefore, funds derived from the insurance should be placed in a separate fund to be used for this purpose.

Section 465 of the School Code of 1927 provides for the discontinuance and re-location of high schools. Sections 387, 388 and 389 of the School Code of 1927 provide for the sale and conveyance of lands deeded to the state for school purposes and the disposition of the proceeds. Therefore, it is not mandatory that a burned school building be replaced. The location may be changed and the property sold.

In view of the above, it is my opinion that the proceeds received from the insurance may be treated as the building itself. In other words, the matter may be considered as if the property were sold under the provisions of Section 387 of the School Code of 1927, supra, provided, the provisions of this section are strictly followed. In this event, the disposition of the proceeds would be governed by Sections 388 and 389 of the School Code of 1927, supra, which are as follows:

> "388. Disposition of proceeds of sale.—The proceeds of any sale of lands made under this article shall be by the State Superintendent of Education paid to the County Treasurer of School Funds where such land is situated."

> "389. Purpose for which proceeds of such sale may be used.—If said lands were conveyed to the State under the provisions of the law relating to securing State aid in the erection or repair of a rural schoolhouse, the proceeds of the sale thereof shall be used by the County Board of Education for the exclusive use of the **public school building fund of the County.** If the lands were conveyed to the State under the provision of the law relating to **high** schools, and there had been no State aid in erecting or repairing any building thereon the proceeds of the sale thereof shall constitute a part of the public school fund of the County." (Emphasis supplied).

The premises considered, it is my opinion that ordinarily the proceeds derived from the insurance should be placed in a separate fund for the replacement of the burned building. However, if the location of the high school in question is changed and the matter considered as a sale under Section 387 of the School Code of 1927, supra, the disposition of the proceeds is governed by Sections 388 and 389 of the School Code of 1927, supra. You do not state whether or not State aid was secured on this high school. Therefore, I cannot advise as to whether the proceeds would be for the exclusive use of the public school building fund of the county or constitute a part of the public school fund of the county in case the matter is treated as a sale. If the funds would go into the special building fund, they could not be used for general school purposes and be replaced later. On the other hand, if they would constitute part of the public school fund of the county this could be done.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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